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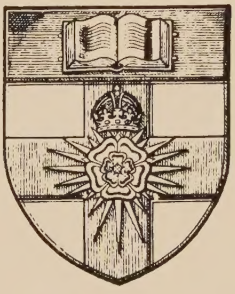

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1924.

THE

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OF THE INCORPORATED COUNCIL OF LAW REPORTING.

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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1924.

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MEMORANDA.

1924.

Jan. 15. *The dignity of a Baron of the United Kingdom was conferred upon the* RIGHT HON. SIR CHARLES JOHN DARLING, KNIGHT, *by the name, style and title of Baron Barling, of Langham, in the County of Essex.*

Jan. 23. THE RIGHT HON. VISCOUNT CAVE *having resigned the office, the Great Seal was this day delivered to the* RIGHT HON. RICHARD BURDON, VISCOUNT HALDANE, K.T., O.M., *whereupon the oath of office as Lord High Chancellor of Great Britain was, by His Majesty's command, administered to him, and he took his place at the Board accordingly.*

Feb. 1. PATRICK HASTINGS, ESQ., K.C., *was appointed to be His Majesty's Attorney-General in the place of the Right Hon. Sir Douglas McGarel Hogg, K.C., resigned, and was afterwards knighted.*

Feb. 1. HENRY HERMAN SLESSER, ESQ., K.C., *was appointed to be His Majesty's Solicitor-General in the place of Sir Thomas Walker Hobart Inskip, K.C., resigned, and was afterwards knighted.*

Apr. 5. SIR WALTER TROWER, *a member of the Incorporated Council of Law Reporting for England and Wales, died at Brighton, aged* 71.

June 5. *A Knighthood was this day conferred upon the* HON. MR. JUSTICE TALBOT.

Sept. 8. THE HON. SIR CLEMENT MEACHER BAILHACHE, *one of the Justices of His Majesty's High Court of Justice, King's Bench Division, died this day at Aldeburgh in his* 68*th year.*

Oct. 7. FRANK DOUGLAS MACKINNON, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, to fill the vacancy caused by the death of Mr. Justice Bailhache, and was afterwards knighted.*

Nov. 7. THE RIGHT HON. VISCOUNT HALDANE *having resigned the office, the Great Seal was this day delivered to the* RIGHT HON. GEORGE, VISCOUNT CAVE, G.C.M.G., *whereupon the oath of office as Lord High Chancellor of Great Britain was, by His Majesty's command, administered to him, and he took his place at the Board accordingly.*

Nov. 10. THE RIGHT HON. SIR DOUGLAS MCGAREL HOGG, K.C., *was appointed to be His Majesty's Attorney-General in the place of Sir Patrick Hastings, K.C., resigned.*

Nov. 14. SIR THOMAS WALKER HOBART INSKIP, C.B.E., K.C., *was appointed to be His Majesty's Solicitor-General in the place of Sir Henry Herman Slesser, K.C., resigned.*

Dec. 13. SIR HUGH FRASER *and the* HON. SIR WILLIAM FINLAY, K.B.E., K.C., *were appointed to be Justices of His Majesty's High Court of Justice, King's Bench Division, pursuant to an Address from both Houses of Parliament.*

ERRATA.

Page	
230	*Dele* footnote "By arrangement . . . . leading argument."
527	Footnote (1) } *add* L. R. 3 Ex. 9.
533	„ }

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co. – H. L. (Sc.)	406
Attorney-General *v.* National Provincial and Union Bank of England – H. L. (E.)	262
———, Southport Corporation *v.* – H. L. (E.)	909
Attorney-General for Ireland *v.* Lagan Navigation Co. H. L. (Ir.)	877
Attorney-General for Ontario *v.* Daly – – – P. C.	1011
v. Reciprocal Insurers– P. C.	328
Attorney-General of British Columbia *v.* Attorney-General of Canada – P. C. 203,	222
Attorney-General of British Columbia, Rex *v.* – P. C.	213
Attorney-General of Canada, Attorney-General of British Columbia *v.* – P. C. 203,	222
Auckland Harbour Board *v.* The King – – – P. C.	318

B.

Baker *v.* Inland Revenue Commissioners – H. L. (E.)	270
Beck & Co. *v.* Szymanowski & Co. – – – H. L. (E.)	43
Benaim & Co. *v.* Debono P. C.	514
Blackwood (John), Ld., Loch *v.* P. C.	783
Board of Trade, Moss Steamship Co. *v.* – H. L. (E.)	133

PAGE

Bolands, Ld., London and Lancashire Fire Insurance Co. *v.* H. L. (Ir.) 836
Bonnan, Imperial Tobacco Co. of India *v.* – – P. C. 755
British Medical Association (New South Wales Branch), Thompson *v.* – – P. C. 764
Burnyeat *v.* Van der Loeff H. L. (E.) 653

C.

Cantiare San Rocco *v.* Clyde Shipbuilding and Engineering Co. – – H. L. (Sc.) 226
Caron *v.* The King – P. C. 999
Christoforides *v.* Terry H. L. (E.) 566
Clan Line Steamers, Standard Oil Co. of New York *v.* H. L. (Sc.) 100
Clouet, Mayson *v.* – – P. C. 980
Clyde Shipbuilding and Engineering Co., Cantiare San Rocco *v.* – – H. L. (Sc.) 226
Colliery (St. Helen's) Co. *v.* Hewitson – – H. L. (E.) 59
Connell, Nimmo (James) & Co. *v.* – – – H. L. (Sc.) 595

D.

Daly, Attorney-General for Ontario *v.* – – P. C. 1011
Debono, Benaim & Co. *v.* P. C. 514
Drughorn *v.* Moore H. L. (E.) 53
Duchesnay, Lacoste *v.* – P. C. 166
Duff Development Co. *v.* Kelantan Government H. L. (E.) 797
Dulieu, Edell *v.* – H. L. (E.) 38
Dumas, Samuel (P.) & Co. *v.* H. L. (E.) 431

E.

Eastern Shipping Co. *v.* Quah Beng Kee – – – P. C. 177

PAGE

Edell *v.* Dulieu – H. L. (E.) 38
Elder, Dempster & Co. *v.* Paterson, Zochonis & Co. H. L. (E.) 522

F.

Fire Insurance (London and Lancashire) Co., Bolands, Ld. *v.* – – H. L. (Ir.) 836

G.

G. *v.* G. – – H. L. (Sc.) 349
Graham Joint Stock Shipping Co. *v.* Merchants Marine Insurance Co. – H. L. (E.) 294
Great Central Ry. Co., Upton *v.* – – – H. L. (E.) 302
Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis & Co. – H. L. (E.) 522

H.

Hetherington *v.* Security Export Co. – – – P. C. 988
Hewitson, St. Helen's Colliery Co. *v.* – – H. L. (E.) 59

I.

Imperial Tobacco Co. of India *v.* Bonnan – – P. C. 755
Inland Revenue Commissioners, Baker *v.* H. L. (E.) 270

———, Nevill *v.* H. L. (E.) 385
Insurance (Merchant Marine) Co., Graham Joint Stock Shipping Co. *v.* – H. L. (E.) 294
Inverclyde's (Lord) Trustees *v.* Millar – – H. L. (Sc.) 580

J.

Jubilee Cotton Mills (Receiver of) *v.* Lewis – H. L. (E.) 958

K.

PAGE

Kelantan Government, Duff Development Co. *v.* H. L. (E.) 797

L.

La Compañia Martiartu *v.* Royal Exchange Assurance Corporation – H. L. (E.) 850
Lacoste *v.* Duchesnay – P. C. 166
Lagan Navigation Co., Attorney-General for Ireland *v.* H. L. (Ir.) 877
Laird Line, United States Shipping Board *v.* – H. L. (Sc.) 286
Leeds Industrial Co-operative Society *v.* Slack – H. L. (E.) 851
Lewis, Jubilee Cotton Mills (Receiver of) *v.* H. L. (E.) 958
Loch *v.* Blackwood (John), Ld. P. C. 783
London and Lancashire Fire Insurance Co. *v.* Bolands, Ld. – – – H. L. (Ir.) 836
London Theatre of Varieties, Performing Right Society *v.* H. L. (E.) 1
Lord Advocate *v.* Macalister H. L. (Sc.) 586

M.

Macalister, Lord Advocate *v.* H. L. (Sc.) 586
McDonald (Gerald) & Co. *v.* Nash & Co. – H. L. (E.) 625
Mayson *v.* Clouet – – P. C. 980
Merchants Marine Insurance Co., Graham Joint Stock Shipping Co. *v.* – H. L. (E.) 294
Millar, Inverclyde's (Lord) Trustees *v.* – H. L. (Sc.) 580
Montréal-Nord (Ville de), Montreal Tramways Co. *v.* P. C. 994
Montreal Tramways Co. *v.* Montréal-Nord (Ville de) P. C. 994
Moore, Drughorn *v.* H. L. (E.) 53

PAGE

Moss Steamship Co. *v.* Board of Trade – – H. L. (E.) 133
Motor Trucks, Ld., United States of America *v.* – P. C. 196

N.

Nash & Co., McDonald (Gerald) & Co. *v.* – – H. L. (E.) 625
National Provincial and Union Bank of England, Attorney-General *v.* – H. L. (E.) 262
Navigation (Lagan) Co., Attorney-General for Ireland *v.* H. L. (Ir.) 877
Nevill *v.* Inland Revenue Comsioners – – H. L. (E.) 385
Nimmo (James) & Co. *v.* Connell – – – H. L. (Sc.) 595

P.

Pacific Steam Navigation Co., Anglo-Newfoundland Development Co. *v.* H. L. (Sc.) 406
Paterson, Zochonis & Co., Elder, Dempster & Co. *v.* H. L. (E.) 522

Griffiths Lewis Steam Navigation Co. *v.* – H. L. (E.) 522
Performing Right Society *v.* London Theatre of Varieties H. L. (E.) 1
Port of London Authority *v.* Woolwich Corporation H. L. (E.) 936

Q.

Quah Beng Kee, Eastern Shipping Co. *v.* – – P. C. 177

R.

Reciprocal Insurers, Attorney-General for Ontario *v.* P. C. 328

	PAGE
Rex *v.* Attorney-General of British Columbia – P. C.	213
——, Auckland Harbour Board *v.* – – – – P. C.	318
——, Caron *v.* – – P. C.	999
Royal Exchange Assurance Corporation, La Compañia Martiartu *v.* – H. L. (E.)	850
Russell *v.* Russell – H. L. (E.)	687

S.

St. Helen's Colliery Co. *v.* Hewitson – – H. L. (E.)	59
St. Lucia (Colonial Treasurer), St. Lucia Usines and Estates Co. *v.* – – – P. C.	508
St. Lucia Usines and Estates Co. *v.* St. Lucia (Colonial Treasurer) – – P. C.	508
St. Michel (Ville de), Shannon Realties *v.* – – P. C.	185
Samuel (P.) & Co. *v.* Dumas H. L. (E.)	431
Sasson *v.* Sasson – – P. C.	1007
Security Export Co., Hetherington *v.* – – – P. C.	988
Shannon Realties, Ld. *v.* St. Michel (Ville de) – P. C.	185
Shipbuilding and Engineering (Clyde) Co., Cantiare San Rocco *v.* – – H. L. (Sc.)	226
Shipping (Eastern) Co. *v.* Quah Beng Kee – P. C.	177
Shipping (Graham Joint Stock) Co. *v.* Merchants Marine Insurance Co. – H. L. (E.)	294
Slack, Leeds Industrial Co-operative Society *v.* H. L. (E.)	851
Smith, Welden *v.* – – P. C.	484
Somerville, Verge *v.* – P. C.	496
Southport Corporation *v.* Attorney-General – H. L. (E.)	909
Standard Oil Co. of New York *v.* Clan Line Steamers H. L. (Sc.)	100
Steam Navigation (Griffiths Lewis) Co. *v.* Paterson, Zochonis & Co. – H. L. (E.)	522
Steam Navigation (Pacific) Co., Anglo-Newfoundland Development Co. *v.* H. L. (Sc.)	406
Steamship (Moss) Co. *v.* Board of Trade – – H. L. (E.)	133
Szymanowski & Co., Beck & Co. *v.* – – H. L. (E.)	43

T.

Terry, Christoforides *v.* H. L. (E.)	566
Thompson *v.* British Medical Association (New South Wales Branch) – – P. C.	764
Tramways (Montreal) Co. *v.* Montréal-Nord (Ville de) P. C.	994

U.

United States of America *v.* Motor Trucks, Ld. – P. C.	196
United States Shipping Board *v.* Laird Line – H. L. (Sc.)	286
Upton *v.* Great Central Ry. Co. H. L. (E.)	302

V.

Van der Loeff, Ward *v.* Van der Loeff, Burnyeat *v.* H. L. (E.)	653
Verge *v.* Somerville – P. C.	496

W.

Ward *v.* Van der Loeff H. L. (E.)	653
Welden *v.* Smith – – P. C.	484
Woolwich Corporation, Port of London Authority *v.* H. L. (E.)	936

TABLE OF CASES CITED.

A.

		PAGE
A. B. *v.* C. B.	8 F. 603	349
—— *v.* C. D.	38 S. L. R. 559	351
—— *v.* ——	10 S. L. T. 266	351
A and B Taxis, Ld. *v.* Secretary of State for Air	[1922] 2 K. B. 328	137
Abbott *v.* City of St. John	40 Can. S. C. R. 597	999
Admiralty Commissioners *v.* S.S. Volute	[1922] 1 A. C. 129	408
Alexander *v.* Kirkpatrick	L. R. 2 H. L. Sc. 397	654
Alexandria Water Company *v.* Musgrave	11 Q. B. D. 174	585
Allcock *v.* Rogers	11 B. W. C. C. 149	305
Allen *v.* Ayres	[1884] W. N. 242	853
—— *v.* Flood	[1898] A. C. 1	137
Amalgamated Syndicate, In re	[1897] 2 Ch. 600	790
Ambrose Lake Tin and Copper Mining Company, In re	14 Ch. D. 390	962
Anderson *v.* Francis	[1906] W. N. 160	855
Andrew *v.* Failsworth Industrial Society	[1904] 2 K. B. 32	94
Anghelatos *v.* Northern Assurance Company	14 Ll. L. Rep. 361	433
Anglo-African Company *v.* Lamzed	L. R. 1 C. P. 226	117
Anglo-Egyptian Navigation Company *v.* Rennie	L. R. 10 C. P. 271	230
Annette (The)	[1919] P. 105	801
Appleby *v.* Myers	L. R. 2 C. P. 651	229
Arkell *v.* Gudgeon	118 L. T. 258; 10 B. W. C. C. 660	304
Armstrong, Whitworth & Co. *v.* Redford	[1920] A. C. 757	63, 304
Ashton Gas Company *v.* Attorney-General	[1904] 2 Ch. 621; [1906] A. C. 10	581
Atlantic Shipping and Trading Company *v.* Dreyfus (Louis) & Co.	[1922] 2 A. C. 250	525
Attorney-General *v.* Anderton	[1921] 1 K. B. 159	586
—— *v.* Great Northern Railway Company	[1916] 2 A. C. 356	486, 878
—— *v.* National Provincial Bank	[1924] W. N. 15; [1923] 1 Ch. 258	503
—— *v.* Nichol	16 Ves. 338	855
—— *v.* Robertson	[1893] 1 Q. B. 293	589
—— *v.* Sefton (Earl)	11 H. L. C. 257	589
Attorney-General for Alberta *v.* Attorney-General for Canada	[1916] 1 A. C. 588	329
Attorney-General for Ontario *v.* Attorney-General for Canada	[1916] 1 A. C. 598	331
Attorney-General for Quebec *v.* Queen Insurance Company	3 App. Cas. 1090	337
Attorney-General of Australia *v.* Adelaide Steamship Company	[1913] A. C. 781	137, 765
Attorney-General of British Columbia *v.* Attorney-General of Canada	14 App. Cas. 295	213

		PAGE
Attorney-General of New South Wales *v.* Collector of Customs, New South Wales	5 Commonwealth L. R. 818	225
Attorney-General of Ontario *v.* Mercer	8 App. Cas. 767	213
Australian Workers' Union *v.* Adelaide Milling Company	26 C. L. R. 460	487
Aylesford Peerage Case	11 App. Cas. 1	689
Aynsley *v.* Glover	L. R. 18 Eq. 544; L. R. 10 Ch. 283	855

B.

Bagnall *v.* Carlton	6 Ch. D. 371	972
Bailey & Son *v.* Holborn and Frascati	[1914] 1 Ch. 598	855
Baird *v.* Lees	1924 S. C. 83	784
Baird (William) & Co. *v.* M'Graw	13 B. W. C. C. 233	65
Baker *v.* Adam	15 Com. Cas. 227	296
—— *v.* Storey	31 L. T. 631; 23 W. R. 147	657
Banbury Peerage Case	1 S. & S. 153	690
Bank Line *v.* Capel (Arthur) & Co.	[1919] A. C. 435	138
Bank of Australasia *v.* Clan Line Steamers	[1916] 1 K. B. 39	525
Bank of England *v.* Vagliano Brothers	[1891] A. C. 107	451, 633
Bank of Toronto *v.* Lambe	12 App. Cas. 575	1000
Bater *v.* Bater	[1906] P. 209	1008
Bell *v.* Armstrong, Whitworth & Co.	12 B. W. C. C. 138	63
Bentley *v.* Craven	18 Beav. 75	569
Bentsen *v.* Taylor, Sons & Co.	[1893] 2 Q. B. 274	434
Bernard's Settlement, In re	[1916] 1 Ch. 552	657
Bett *v.* Hughes	52 S. L. R. 93; 8 B. W. C. C. 362	304
Birmingham and District Land Company *v.* London and North Western Railway Company	34 Ch. D. 261	179
Black *v.* Fife Coal Company	1909 S. C. 152; [1912] A. C. 149; 1912 S. C. (H. L.) 33	422, 598
—— *v.* Scottish Temperance Life Assurance Co.	[1908] 1 I. R. 541	854
Blair *v.* Duncan	[1902] A. C. 37	263, 498
Blair Open Hearth Furnace Company, In re	[1914] 1 Ch. 390	959
Blake *v.* Ramsay	51 Ir. L. T. 6; 10 B. W. C. C. 500	304
Blakeley *v.* Muller & Co.	[1903] 2 K. B. 760*n.*	229
Blériot Manufacturing Aircraft Company, In re	32 Times L. R. 253	791
Board of Commerce Act, In re	[1922] 1 A. C. 191	329
Boehm *v.* Bell	8 T. R. 154	444
Boggan *v.* Motor Union Insurance Company	[1922] 2 I. R. 184; [1923] 2 I. R. 136	836, 840
Bohn *v.* Bogue	11 Jur. 420	2
Boks & Co. and Peters, Rushton & Co., In re	[1919] 1 K. B. 491	805
Bolton Estates Act, 1863, In re	[1904] 2 Ch. 289	387
Bond, Connolly & Co. *v.* Federal Steam Navigation Company	21 Times L. R. 438; 22 Times L. R. 685	523

		PAGE
Boston Fruit Company *v.* British and Foreign Marine Insurance Company	[1905] 1 K. B. 637; [1906] A. C. 336	296
Bowden *v.* Bowden	62 Sol. J. 105	736
Bowden's Patents Syndicate *v.* Smith (Herbert) & Co.	[1904] 2 Ch. 86	2
Bowes *v.* Law	L. R. 9 Eq. 636	855
Bowman *v.* Secular Society	[1917] A. C. 406	263
Brabant & Co. *v.* King	[1895] A. C. 632	484
Brandt's Sons & Co. *v.* Dunlop Rubber Company	8 Com. Cas. 174; [1904] 1 K. B. 387; [1905] A. C. 454	2, 31
Bristol and Exeter Railway Company *v.* Collins	7 H. L. C. 194	527
British and Foreign Cork Company, In re	L. R. 1 Eq. 231	54
British and Foreign Marine Insurance Company *v.* Gaunt	[1921] 2 A. C. 41	436
British Wagon Company *v.* Gray	[1896] 1 Q. B. 35	829
Britten *v.* Webb	2 B. & C. 483	628
Brooks-Bidlake and Whittall *v.* Attorney-General for British Columbia	[1923] A. C. 450	204
Broomfield (The)	10 Asp. M. L. C. 194	408
Brown *v.* National Provident Institution	[1921] 2 A. C. 222	509
Burrell, Ex parte	L. R. 10 Ch. 512	981
Byas *v.* Miller	3 Com. Cas. 39	296
Bywell Castle (The)	4 P. D. 219	286
Byzantion (The)	38 Times L. R. 744	438

C.

C. and E. Townsites, Ld. *v.* Wetaskiwin (City)	59 Can. S. C. R. 578	187
Caird *v.* Sime	12 App. Cas. 326	410
Canada and Gulf Terminal Railway Company *v.* Fleet	28 Q. R. (K. B.) 112	995
Cape Breton Company, In re	29 Ch. D. 795	962
Carib Prince (The)	170 U. S. 655	104
Carling's Case	1 Ch. D. 115	961
Carr *v.* Fracis Times & Co.	[1902] A. C. 176	802
Castagli *v.* Castagli	[1919] A. C. 145	1008
Castellain *v.* Preston	11 Q. B. D. 380	437
Cayzer & Co. *v.* Carron Company	9 App. Cas. 873	415
Chandler *v.* Webster	[1904] 1 K. B. 493	227, 229
Chapman *v.* S.S. John W. Pearn		304
Chapman, Morsons & Co. *v.* Auckland Union	23 Q. B. D. 294	853
Charkieh (The)	L. R. 4 A. & E. 59	800
Chilton *v.* Blair & Co.	7 B. W. C. C. 607	313
Christchurch Inclosure Acts, In re	38 Ch. D. 520	498
Churchward *v.* The Queen	L. R. 1 Q. B. 173	320
Ciampa *v.* British India Steam Navigation Company	[1915] 2 K. B. 774	524
Citizens Insurance Company *v.* Parsons	7 App. Cas. 96	337, 1000
Clark *v.* Lord Advocate	59 S. L. R. 442; 15 B. W. C. C. 320	304
Clarke, In re	35 Ch. D. 109; 36 Ch. D. 348	8

		PAGE
Clarke, In re	[1923] 2 Ch. 407	498
Clarke & Chapman *v.* Hart	6 H. L. C. 633	434
Cohn *v.* Davidson	2 Q. B. D. 455	532
Colburn *v.* Duncombe	9 Sim. 152	2
Colls *v.* Home and Colonial Stores	[1904] A. C. 179	853
Collyer *v.* Isaacs	19 Ch. D. 342	32
Commercial Cable Company *v.* Newfoundland Government	[1916] 2 A. C. 610	320
Commissioners for Special Purposes of Income Tax *v.* Pemsel	[1891] A. C. 531	263
Constantine & Co. *v.* Warden & Sons	73 L. T. 450	179
Cook *v.* S.S. Montreal	6 B. W. C. C. 220	65
Cooper *v.* Cooper	13 App. Cas. 88	515
——— *v.* Waldegrave (Earl)	2 Beav. 282	515
Cornwall *v.* Henson	[1899] 2 Ch. 710; [1900] 2 Ch. 298	981, 982
Cowley (Earl) *v.* Inland Revenue Commissioners	[1899] A. C. 198	387
Cowper *v.* Laidler	[1903] 2 Ch. 337	854
Craddock Brothers *v.* Hunt	[1922] 2 Ch. 809; [1923] 2 Ch. 136	196
Cranston, In re	[1898] 1 I. R. 431	263, 497
Cremins *v.* Guest, Keen & Nettlefolds	[1908] 1 K. B. 469	60
Cross, Tetley & Co. *v.* Catterall	Unreported	64
Cullen *v.* Butler	5 M. & S. 461	457
Cunningham *v.* Tomey Homma	[1903] A. C. 151	204, 331
Cuno *v.* Cuno	L. R. 2 H. L. Sc. 300	695
Curriers' Company *v.* Corbet	4 D. J. & S. 764	855
Cutler *v.* Littleton	2 Mor. 583	228

D.

Darnley (Earl) *v.* London, Chatham and Dover Railway Company	L. R. 2 H. L. 43	480
Davenport *v.* Rylands	L. R. 1 Eq. 302	871
Davidson *v.* Burnand	L. R. 4 C. P. 117	453
Davidson & Co. *v.* M'Robb	[1918] A. C. 304	62, 304
Davies *v.* Mann	10 M. & W. 546	415
——— *v.* Rhymney Iron Company	16 Times L. R. 329	62
Davis, In re	[1923] 1 Ch. 225	498
Davis & Primrose *v.* Clyde Shipbuilding and Engineering Company	1917 1 S. L. T. 297	229
Dawson, In re	39 Ch. D. 155	657
Day *v.* Longhurst	62 L. J. (Ch.) 334	628
Déchéne *v.* Montreal (City)	[1894] A. C. 640	187
Decroix, Verley et Cie. *v.* Meyer & Co.	25 Q. B. D. 343; [1891] A. C. 520	628
Delaurier *v.* Wyllie	17 R. 167	527
De Mattos *v.* Gibson	4 De G. & J. 276	7
Demerara Bauxite Company *v.* Hubbard	[1923] A. C. 673	784
Dennis *v.* White & Co.	[1917] A. C. 479	304
Dental Manufacturing Company *v.* De Trey & Co.	[1912] 3 K. B. 76	756
Devonport *v.* The Queen	3 App. Cas. 115	480
Dickinson *v.* Dickinson	[1913] P. 198	351
Dillet, In re	12 App. Cas. 459	1013

		PAGE
Dixon *v.* Treasury Solicitor	[1905] P. 42	676
Doddington's Case	Cro. Eliz. 545	320
Doe *v.* Allen	3 Taunt. 78	482
Dorin *v.* Dorin	L. R. 7 H. L. 568	657
Dow *v.* Black	L. R. 6 P. C. 272	1000
Dreyfus *v.* Peruvian Guano Company	43 Ch. D. 316	851
Drughorn (Fred.), Ld. *v.* Rederiaktiebolaget Transatlantic	[1919] A. C. 203	297
Dudgeon *v.* Pembroke	L. R. 9 Q. B. 581	435
——— *v.* ———	2 App. Cas. 284	437
Duguid *v.* Fraser	31 Ch. D. 449	656
Duncan *v.* Hill	L. R. 8 Ex. 242	569
Dungannon (Lord) *v.* Smith	12 Cl. & F. 546	664
Durell *v.* Pritchard	L. R. 1 Ch. 244	855
Durham Brothers *v.* Robertson	[1898] 1 Q. B. 765	8
Dyke *v.* Walford	5 Moo. P. C. 434	217

E.

Ebsworth *v.* Alliance Marine Insurance Company	L. R. 8 C. P. 596	437
Edwards *v.* Wingham Agricultural Implements Company	6 B. W. C. C. 511	63
Elliott, In re	102 L. T. 528	496
Elliott Steam Tug Company *v.* Shipping Controller	[1922] 1 K. B. 127	135
Ellis *v.* Pond	[1898] 1 Q. B. 426	569
Elmore *v.* Pirrie	57 L. T. 333	872
Emmy Haase (The)	9 P. D. 81	287
Emperor of Austria *v.* Day and Kossuth	3 D. F. & J. 217	801, 855
Erlanger *v.* New Sombrero Phosphate Company	3 App. Cas. 1218	962
Erskine, Oxenford & Co. *v.* Sachs	[1901] 2 K. B. 504	566
Europa (The)	[1908] P. 84	536
Evans (Joseph) & Co. *v.* Heathcote	[1918] 1 K. B. 418	769
Eve, In re	[1909] 1 Ch. 796	655

F.

F. *v.* D.	4 Sw. & T. 86	695
— *v.* P.	75 L. T. 192	351
Fairclough *v.* Marshall	4 Ex. D. 37	5
Farnell *v.* Bowman	12 App. Cas. 643	484
Fearnley *v.* Bates & Northcliffe	10 B. W. C. C. 308	304
Fenton *v.* Thorley & Co.	[1903] A. C. 443	436
Ferguson *v.* Wilson	L. R. 2 Ch. 77	854
Ferns *v.* Carr	28 Ch. D. 409	228
Ferro (The)	[1893] P. 38	527
Field *v.* Receiver of Metropolitan Police	[1907] 2 K. B. 853	841
Finchley Electric Light Company *v.* Finchley Urban Council	[1903] 1 Ch. 437	911
Finegan *v.* Finegan	33 Times L. R. 173	351
Finlay, In re	[1913] 1 Ch. 565	570
Fleetwood, In re	15 Ch. D. 594	656
Floyer *v.* Bankes	3 D. J. & S. 306	589

		PAGE
Foster *v.* Globe Venture Syndicate	[1900] 1 Ch. 811	801
Foulkes *v.* Metropolitan District Railway Company	5 C. P. D. 157	527
Fowles *v.* Eastern and Australian Steamship Company	[1916] 2 A. C. 556	486
Fox, Ex parte	L. R. 6 Ch. 176	790
France *v.* Clark	26 Ch. D. 257	628
Fraser *v.* Riddell (John) & Co.	7 B. W. C. C. 841	312
French Marine *v.* Compagnie Napolitaine d'Éclairage et de Chauffage par le Gaz	27 Com. Cas. 69	230
Frenche's Case	Roll. Abr. "Devise," O. 4	657
Fritz *v.* Hobson	14 Ch. D. 542	855

G.

G. *v.* G.	L. R. 2 P. & M. 287	353
— *v.* M.	10 App. Cas. 171	351
Gagara (The)	[1919] P. 95	801
Gane *v.* Norton Colliery Company	[1909] 2 K. B. 539	60
Gaskill *v.* Gaskill	[1921] P. 425; 37 Times L. R. 977	695, 717
Gassiot, In re	70 L. J. (Ch.) 242	496
Gibraltar (Sanitary Commissioners) *v.* Orfila	15 App. Cas. 400	493
Gibson *v.* Small	4 H. L. C. 353	536
Gilroy, Sons & Co. *v.* Price & Co.	20 R. (H. L.) 1	410
——— *v.* ———	[1893] A. C. 56	531, 598
Gleaner & Co. *v.* Assessment Committee	[1922] 2 A. C. 169	509
Glendarroch (The)	[1894] P. 226	103
Glenie *v.* Bruce Smith	[1907] 2 K. B. 507; [1908] 1 K. B. 263	625, 628
Glynn *v.* Margetson & Co.	[1893] A. C. 351	46
Goldsmiths' Company *v.* West Metropolitan Railway Company	[1904] 1 K. B. 1	962
Gooch, In re	[1921] 2 K. B. 593	625
Goodman *v.* Saltash (Mayor)	7 App. Cas. 633	496
Goodright *v.* Moss	2 Cowp. 591	689
Goolam Hossen & Co. *v.* Union Marine Insurance Company	[1901] A. C. 362	435
Gordon *v.* Gordon	[1903] P. 141; Times Newspaper, Feb. 16, 1903	690, 734
——— *v.* Rimmington	1 Camp. 123	466
Grace *v.* Newman	L. R. 19 Eq. 623	5
Graham *v.* Tate	1 M. & S. 609	54
Grant, Smith & Co. *v.* Seattle Construction and Dry Dock Company	[1920] A. C. 162	435
Great West Saddlery Company *v.* The King	[1921] 2 A. C. 91	337, 1000
Greenstreet *v.* Cumyns	2 Phill. Eccl. Rep. 10	696
Gresham Life Assurance Society *v.* Styles	[1892] A. C. 309	585
Grimond *v.* Grimond	[1905] A. C. 124	498
Gunford Ship Company *v.* Thames and Mersey Marine Insurance Company	1910 S. C. 1072	105
Gurney *v.* Longman	13 Ves. 493	6

H.

		PAGE
H.M.S. Sans Pareil	[1900] P. 267	416
Hamilton *v.* Lord Advocate	1918 S. C. 135; [1920] A. C. 50	589
——— *v.* Young	7 L. R. Ir. 289	569
Hamilton, Fraser & Co. *v.* Pandorf & Co.	12 App. Cas. 518	448
Hamilton's (Duke) Trustees *v.* Fleming	9 M. 329	230
Hamlyn & Co. *v.* Talisker Distillery	[1894] A. C. 202	515
Hammer *v.* Dagenhat	247 U. S. 251	338
Hardoon *v.* Belilios	[1901] A. C. 118	179
Hardy & Co. *v.* Hillerns and Fowler	[1923] 2 K. B. 490	516
Harrison *v.* Holland	[1921] 3 K. B. 300; [1922] 1 K. B. 211	980, 987
Harvey *v.* Farnie	8 App. Cas. 43	1008
Hawes *v.* Draeger	23 Ch. D. 173	690
Hayn *v.* Culliford	3 C. P. D. 410; 4 C. P. D. 182	117, 527
Hayward, Ex parte	L. R. 6 Ch. 546	652
Hedley *v.* Pinkney & Sons Steamship Company	[1894] A. C. 222	526
Herbert *v.* Fox (Samuel) & Co.	[1916] 1 A. C. 405	79, 410
Herdman *v.* Wheeler	[1902] 1 K. B. 361	628
Hertfordshire County Council *v.* Great Eastern Railway Company	[1909] 2 K. B. 403	887
Hetherington *v.* Hetherington	56 L. J. (P. & A.) 78; 57 L. T. (N. S.) 533; 12 P. D. 112	695, 717
Heyman *v.* Parish	2 Camp. 149	437
Higgins *v.* Dawson	[1902] A. C. 1	663
Hiliard *v.* Phaly	8 Mod. 180	693
Hill *v.* Crook	L. R. 6 H. L. 265	657
Hindley *v.* Emery	L. R. 1 Eq. 52	872
Hirschfeld *v.* Smith	L. R. 1 C. P. 340	646
Hodges *v.* Welsh	2 Ir. Eq. Rep. 266	4
Hogan *v.* Shaw	5 Times L. R. 613	570
Hogarth *v.* Walker	[1899] 2 Q. B. 401; [1900] 2 Q. B. 283	526
Holland *v.* Worley	26 Ch. D. 578	853
Holmes *v.* Great Northern Railway Company	[1900] 2 Q. B. 409	60, 317
Holroyd *v.* Marshall	10 H. L. C. 191	4
Horlock *v.* Beal	[1916] 1 A. C. 486	230
Houston *v.* Burns	[1918] A. C. 337	263
Howe *v.* Smith	27 Ch. D. 89	980
Hudston *v.* Hudston	39 Times L. R. 108	351
Hunter *v.* Simner	14 B. W. C. C. 327	304
Hutchinson *v.* M'Kinnon	[1916] 1 A. C. 471	79
Hyslop's Case	2 Br. Supp. 520	228

I.

Ilchester (Earl), Ex parte	7 Ves. 348	656
Imperial Gas Light and Coke Company *v.* Broadbent	7 H. L. C. 600	853
Income Tax Commissioners *v.* Pemsel	[1891] A. C. 531	497
Ingram & Royle *v.* Services Maritimes du Tréport	[1913] 1 K. B. 538	524

		PAGE
International Navigation Company *v.* Farr and Bailey Manufacturing Company	181 U. S. 218	104
Isenberg *v.* East India House Estate Company	3 D. J. & S. 263	855

J.

Jackson *v.* Newcastle (Duke)	3 D. J. & S. 275	855
Jacobs *v.* Crédit Lyonnais	12 Q. B. D. 589	515
James, Ex parte	8 Ves. 337	569
Jeans, In re	72 L. T. 835	657
Jee *v.* Audley	1 Cox, 324	654
Jenkins & Sons *v.* Coomber	[1898] 2 Q. B. 168	628
Jibb *v.* Chadwick	[1915] 2 K. B. 94	313
John Deere Plow Company *v.* Wharton	[1915] A. C. 330	331
Johnston *v.* Salvage Association	19 Q. B. D. 458	180
Johnstone *v.* Milling	16 Q. B. D. 460	981
Jones *v.* Commonwealth Court of Conciliation	[1917] A. C. 528	1000
—— *v.* Garcia del Rio	T. & R. 297	802
—— *v.* Nicholson	10 Ex. 28	436
Jordeson *v.* Sutton, Southcoates and Drypool Gas Company	[1898] 2 Ch. 614; [1899] 2 Ch. 217	853
Joseph *v.* Lyons	15 Q. B. D. 280	8

K.

Keene *v.* Beard	8 C. B. (N. S.) 372	634
Keighley, Maxsted & Co. *v.* Durant	[1901] A. C. 240	296
Kine *v.* Jolly	[1905] 1 Ch. 480; [1907] A. C. 1	855
King of Spain *v.* Hullet and Widder	1 Cl. & F. 333	802
Kirby Hall (The)	8 P. D. 71	287
Kish *v.* Taylor	[1912] A. C. 604	536
Kitchenham *v.* Johannesburg (Owners of S.S.)	[1911] A. C. 417	73
Kopitoff *v.* Wilson	1 Q. B. D. 377	524
Krehl *v.* Burrell	7 Ch. D. 551; 11 Ch. D. 146	854
Krell *v.* Henry	[1903] 2 K. B. 740	229
Kwang Tung (S.S.) *v.* Ngapoota (S.S.)	[1897] A. C. 391	290

L.

Lacey, Ex parte	6 Ves. 625	569
Lady Forrest (Murchison) Gold Mine, In re	[1901] 1 Ch. 582	962
Ladywell Mining Company *v.* Brookes	35 Ch. D. 400	962
Lancashire and Yorkshire Railway Company *v.* Highley	[1917] A. C. 352	64
Lang *v.* Lang	1921 S. C. 44	351
Lecouturier *v.* Rey	[1910] A. C. 262	756
Leeds Corporation *v.* Ryder	[1907] A. C. 420	989
Leeson *v.* General Council of Medical Education	43 Ch. D. 366	780
Legge *v.* Edmonds	25 L. J. (Ch.) 125	738

		PAGE
Leitch *v.* Wilson	7 M. 150	229
Le Mesurier *v.* Le Mesurier	[1895] A. C. 517	1008
Lennard's Carrying Company *v.* Asiatic Petroleum Company	[1915] A. C. 705	106
Leyland Shipping Company *v.* Norwich Union Fire Insurance Society	[1918] A. C. 350	296, 436
Lickbarrow *v.* Mason	6 East, 20*n.*	651
Lind, In re	[1915] 2 Ch. 345	4
Litchfield-Speer *v.* Queen Anne's Gate Syndicate (No. 2)	[1919] 1 Ch. 407	854
Lloyds Bank *v.* Cooke	[1907] 1 K. B. 794	628
Lodge *v.* National Union Investment Company	[1907] 1 Ch. 300	961
London and India Docks Company *v.* Woolwich (Borough of)	[1902] 1 K. B. 750	939
London County Council *v.* Attorney-General	[1901] A. C. 26	581
Lord Advocate *v.* Hamilton	1918 S. C. 135; [1920] A. C. 50	593
Luther *v.* Sagor	[1921] 1 K. B. 456; [1921] 3 K. B. 532	802, 825
Lyle & Sons *v.* Schwan (Owners of S.S.)	[1909] A. C. 450	127
Lyon *v.* Mells	5 East, 428	530

M.

M. *v.* G.	10 S. L. T. 264	351
McColl *v.* Canadian Pacific Railway Company	[1923] A. C. 126	346
Macdonald *v.* Eyles	[1921] 1 Ch. 631	5
Macdonald *v.* Whitfield	8 App. Cas. 733	628
Macduff, In re	[1896] 2 Ch. 451	496
McFadden *v.* Blue Star Line	[1905] 1 K. B. 697	104, 523
McGiffin *v.* Palmer's Shipbuilding and Iron Company	10 Q. B. D. 5	595
Mackay *v.* Dick	6 App. Cas. 251; 8 R. (H. L.) 37	408
McKenzie, In re	31 U. C. Q. B. 1	1012
McNicholas *v.* Dawson & Son	[1899] 1 Q. B. 773	311
Macoun *v.* Erskine, Oxenford & Co.	[1901] 2 K. B. 493	566
Maori King (The) *v.* Hughes	[1895] 2 Q. B. 550	524
Maritime Bank of Canada *v.* Receiver-General of New Brunswick	[1892] A. C. 437	215, 342
Marsh *v.* Pope & Pearson	10 B. W. C. C. 566	304
Marshall *v.* York, Newcastle and Berwick Railway Company	21 L. J. (C. P.) 34	564
Martin *v.* Great Indian Peninsula Railway Company	37 L. J. (Ex.) 27	527
——— *v.* Price	[1894] 1 Ch. 276	853
Matthews *v.* Smallwood	[1910] 1 Ch. 777	477
Mawdsley *v.* West Leigh Colliery Company	5 B. W. C. C. 80	313
Mawman *v.* Tegg	2 Russ. 385	2
May *v.* Platt	[1900] 1 Ch. 616	198
Mayer *v.* Jadis	1 Moo. & R. 247	628
Mendip Range (S.S.) *v.* Radcliffe	[1921] 1 A. C. 556	408

		PAGE
Mercer *v.* Ogilvy	3 Paton, 434	962
Metcalfe *v.* York (Archbishop)	1 My. & Cr. 547	4
Metropolitan Water Board *v.* Dick, Kerr & Co.	[1918] A. C. 119	230
Meux *v.* Great Eastern Railway Company	[1895] 2 Q. B. 387	527
Midland Insurance Company *v.* Smith	6 Q. B. D. 561	471
Mighell *v.* Sultan of Johore	[1894] 1 Q. B. 149	798
Millar *v.* Refuge Assurance Company	1912 S. C. 37; 5 B. W. C. C. 522	304
—— *v.* Taylor	4 Burr. 2303	6
Mir-Anwaruddin, Ex parte	[1917] 1 K. B. 634	1008
Mitchell *v.* Cameron	8 Can. S. C. R. 126	1012
Mitford *v.* Mitford	[1923] P. 130	1008
Moes, Moliere & Tromp *v.* Leith and Amsterdam Shipping Company	5 M. 988	103
Mogul Steamship Company *v.* McGregor, Gow & Co.	[1892] A. C. 25	765
Montgomery *v.* Liebenthal	[1898] 1 Q. B. 487	809
Montreal (City) *v.* Attorney-General for Canada	[1923] A. C. 136	223
Moore *v.* Lunn	38 Times L. R. 649	105
—— *v.* Manchester Liners	[1910] A. C. 498	73
Moran, Galloway & Co. *v.* Uzielli	[1905] 2 K. B. 555	438
Morgan *v.* Bettisfield Colliery Company	15 B. W. C. C. 52	305
Morice *v.* Durham (Bishop)	9 Ves. 399; 10 Ves. 522	498
Morley *v.* Rennoldson	[1895] 1 Ch. 449	656
Morris *v.* Davies	5 Cl. & F. 163	690
Motor Union Insurance Company *v.* Boggan	[1923] 2 I. R. 136	840
Mountain *v.* Whittle	[1921] 1 A. C. 615	435

N.

Napier *v.* Napier	[1915] P. 184	351
National Park Bank of New York *v.* Berggren	19 Com. Cas. 234	628
National Provincial Plate Glass Insurance Company *v.* Prudential Assurance Company	6 Ch. D. 757	855
Newbattle (The)	10 P. D. 33	802
Newbridge Sanitary Steam Laundry, In re	[1917] 1 I. R. 67	784
Nitrate Producers Steamship Company *v.* Shortt Brothers	38 Times L. R. 747	106
Nobel's Explosives Company *v.* Jenkins & Co.	1 Com. Cas. 436	826
Nolan *v.* Porter & Sons	2 B. W. C. C. 106	62
North British and Mercantile Insurance Company *v.* London, Liverpool and Globe Insurance Company	5 Ch. D. 569	437
North York Election Case, In re	32 U. C. C. P. 458	1012
Northumberland (Duke) *v.* Attorney-General	[1905] A. C. 406	589
Nottingham Guardians *v.* Tomkinson	4 C. P. D. 343	690
Nutt *v.* Bourdieu	1 T. R. 323	464

O.

		PAGE
Ogilvy *v.* Hume	2 Br. Supp. 34	228
Okehampton (The)	[1913] P. 173	527
Onions *v.* Tyrer	1 P. Wms. 343	656
Ousey *v.* Ousey	L. R. 3 P. & M. 223	752
Oxford and Cambridge Universities *v.* Richardson	6 Ves. 689	15

P.

P. *v.* L.	3 P. D. 73*n.*	351
Palmer *v.* Temple	9 Ad. & E. 508	981
Parker *v.* Black Rock (Owners of Ship)	[1915] A. C. 725	71
Parlement Belge (The)	5 P. D. 197	802
Paterson *v.* Harris	1 B. & S. 336	438
Paul *v.* Robson	L. R. 41 Ind. Ap. 180	855
Pearce, In re	[1914] 1 Ch. 254	657
Pearks *v.* Moseley	5 App. Cas. 714	655
Pemberton *v.* Hughes	[1899] 1 Ch. 781	1008
Penney *v.* Clyde Shipbuilding and Engineering Company	1919 S. C. 363; 1920 S. C. (H. L.) 68	229
Percival *v.* Wright	[1902] 2 Ch. 421	785
Performing Right Society *v.* Edinburgh Magistrates	1922 S. C. 165	8
——— *v.* London Theatre of Varieties	[1924] A. C. 1	762
Philbin *v.* Hayes	87 L. J. (K. B.) 779	62
Pillai *v.* Subbammal	L. R. 43 Ind. Ap. 20	656
Plumb *v.* Cobden Flour Mills Company	[1914] A. C. 62	305
Poulett Peerage Case	[1903] A. C. 395	690
Pratt *v.* British Medical Association	[1919] 1 K. B. 244	765
Prohibitions del Roy	12 Rep. 63	800
Pryor *v.* Pryor	12 P. D. 165	735

Q.

Queensland National Bank *v.* Peninsular and Oriental Steam Navigation Company	[1898] 1 Q. B. 567	524
Quinn *v.* Butler	L. R. 6 Eq. 225	656
——— *v.* Leathem	[1901] A. C. 495	765
Quong Wing *v.* The King	49 Can. S. C. R. 440	204

R.

R., In re	[1906] 1 Ch. 730	854
Radley *v.* London and North Western Railway Company	1 App. Cas. 754	417
Raithwaite Hall (The)	2 Asp. M. L. C. 210	408
Ram Anugra Narain Singh *v.* Chowdhry Hanuman Sahai	L. R. 30 I. A. 41	756
Reg. *v.* East and West India Dock Company	60 L. T. 232	879
——— *v.* Wye	7 Ad. & E. 761	694

		PAGE
Reischer *v.* Borwick	[1894] 2 Q. B. 548	447
Republic of Bolivia *v.* Indemnity Mutual Assurance Company	[1909] 1 K. B. 785	840
Republic of Costa Rica *v.* Erlanger	3 Ch. D. 62	804
Rex *v.* Bedall	2 Str. 1076	738
—— *v.* Catterall	6 M. & S. 83	734
—— *v.* Devon (Inhabitants)	4 B. & C. 670	879
—— *v.* Giroux	56 Can. S. C. R. 63	1012
—— *v.* Kea	11 East, 132	689
—— *v.* Local Government Board of Ireland	[1902] 2 I. R. 349	989
—— *v.* Luffe	8 East, 193	694
—— *v.* Reading	Cas. temp. Hard. 79	693
—— *v.* Rook	1 Wils. 340	693
—— *v.* St. Peter's	Burr. Settlemt. Cas. 25	693
—— *v.* Sourton	5 Ad. & E. 180	689
—— *v.* Sovereen	26 Ont. L. R. 16	1012
—— *v.* Stockland	Burr. Settlemt. Cas. 508	693
—— *v.* Wick St. Lawrence	5 B. & Ad. 526	734
—— *v.* Willey	Referred to in Burr. Settlemt. Cas. 27	737
—— *v.* Woodhouse	[1906] 2 K. B. 501	989
Rhodes *v.* Forwood	1 App. Cas. 256	911
Richards *v.* Morris	[1915] 1 K. B. 221	70
Rideout's Trusts, In re	L. R. 10 Eq. 41	690
Rippingall *v.* Rippingall	24 W. R. 967	751
River Derwent (The)	7 Asp. M. L. C. 37	408
River Wear Commissioners *v.* Adamson	2 App. Cas. 743	655
Robson *v.* Whittingham	L. R. 1 Ch. 442	855
Rodger *v.* Paisley School Board	49 S. L. R. 413; 5 B. W. C. C. 547	305
Roper *v.* Radcliffe	9 Mod. 167; 10 Mod. 230; 5 Bro. P. C. (1803 Ed.) 360	657, 673
Rosin and Turpentine Import Company *v.* Jacob & Sons	102 L. T. 81	487
Rothschild *v.* Brookman	5 Bli. N. S. 165	569
———— *v.* Queen of Portugal	3 Y. & C. (Ex.) 594	804
Rowell *v.* Rowell	[1900] 1 Q. B. 9	695
Roxburghe *v.* Wauchope	1 Ross. L. C. 659	669
Royal Exchange Assurance *v.* Kingsley Navigation Company	[1923] A. C. 235	104
Russell *v.* Langstaffe	2 Doug. 514	650
——— *v.* The Queen	7 App. Cas. 829	338
Rutherford *v.* Rutherford	[1923] A. C. 1	701

S.

S. *v.* A.	3 P. D. 72	351
St. Boniface (Archbishop) *v.* Transcona (Town)	56 Can. S. C. R. 56	187
St. Catherine's Milling and Lumber Company *v.* The Queen	14 App. Cas. 46	215
Salaman *v.* Secretary of State for India	[1906] 1 K. B. 613	487
Sarabai *v.* Rabiabai	I. L. R. 30 Bom. 537	1008
Sassoon & Co. *v.* Western Assurance Company	[1912] A. C. 561	435, 448

		PAGE
Saunt *v.* Belcher & Gibbons	26 Com. Cas. 115	515
Sayer's Trusts, In re	L. R. 6 Eq. 319	680
Sayers *v.* Collyer	28 Ch. D. 103	853
Schultz *v.* Astley	2 Bing. N. C. 544	651
Schwan (The)	6 Asp. M. L. C. 409	408
Schwan (The)	[1908] P. 356; [1909] P. 93; [1909] A. C. 450	104, 111, 526, 598
Senior *v.* Pawson	L. R. 3 Eq. 330	853
Sevenoaks Railway Company *v.* London, Chatham and Dover Railway Company	11 Ch. D. 625	879
Sharpness New Docks and Gloucester and Birmingham Navigation Company *v.* Attorney-General	[1915] A. C. 654	486, 878
Shaw & Co. *v.* Holland	[1913] 2 K. B. 15	633
Shelfer *v.* City of London Electric Lighting Company	[1895] 1 Ch. 287	853
Shephard *v.* Innes	2 Mor. 589	228
Shepherd *v.* Henderson	7 App, Cas. 49	411
Sidney, In re	[1908] 1 Ch. 488	498
Sims *v.* Marryat	17 Q. B. 281	9
Sinclair *v.* Brougham	[1914] A. C. 398	230
Singer *v.* Elliott	4 Times L. R. 524	628
Small *v.* United Kingdom Marine Mutual Insurance Association	[1897] 2 Q. B. 42, 311	296, 432
Smith *v.* Baker & Sons	[1891] A. C. 325	599
—— *v.* McClure	5 East, 476	634
—— *v.* Vermillion Hills Rural Council	[1916] 2 A. C. 569	223
Smitton *v.* Orient Steam Navigation Company	12 Com. Cas. 270	106
Sorrell *v.* Smith	[1923] 2 Ch. 32	765
South African Republic *v.* La Compagnie Franco-Belge du Chemin de Fer du Nord	[1897] 2 Ch. 487; [1898] 1 Ch. 190	804
Spackman, Ex parte	1 Mac. & G. 170	788
Spaight *v.* Tedcastle	6 App. Cas. 217	421
Spalding *v.* Gamage	32 R. P. C. 273	756
Speller & Co. *v.* Bristol Steam Navigation Company	13 Q. B. D. 96	179
Stainbank *v.* Fenning	11 C. B. 51	437
Stamma *v.* Brown	2 Str. 1173	464
Steedman *v.* Drinkle	[1916] 1 A. C. 275	981
Steel *v.* State Line Steamship Company	3 App. Cas. 72	104, 524
Steele *v.* M'Kinlay	5 App. Cas. 754	625
Stevenson (Hugh) & Sons *v.* Aktiengesellschaft für Cartonnagen-Industrie	[1918] A. C. 239	231
Stewart & Son *v.* Longhurst	[1916] 2 K. B. 803; [1917] A. C. 249	62, 308
Stokes *v.* City Offices Company	13 L. T. 81	853
Stollmeyer *v.* Petroleum Development Company	[1918] A. C. 498*n.*	854
Strousberg *v.* Republic of Costa Rica	29 W. R. 125; 44 L. T. 199	805
Suarez, In re	[1918] 1 Ch. 176	961
Suburban Hotel Company, In re	L. R. 2 Ch. 737	789
Sugden *v.* Leeds Corporation	[1914] A. C. 483	581
Sweet *v.* Cater	11 Sim. 572	2
—— *v.* Shaw	3 Jur. 217; 8 L. J. (Ch.) 216	2, 4

		PAGE
Sword *v.* Cameron	1 D. 493	605
Sydney Municipal Council *v.* Young	[1898] A. C. 457	995
Symington *v.* Symington's Quarries	8 F. 121	784
Synge *v.* Synge	[1900] P. 180; [1901] P. 317	695

T.

Tailby *v.* Official Receiver	13 App. Cas. 523	4
Tait *v.* Levi	14 East, 481	104
Tamplin Steamship Company *v.* Anglo-Mexican Petroleum Products Company	[1916] 2 A. C. 397	138, 230
Tate *v.* Latham & Co.	[1897] 1 Q. B. 502	599
Tattersall *v.* National Steamship Company	12 Q. B. D. 297	524
Taunton, Ex parte	1 Dowl. P. C. 54	989
Taylor *v.* Barclay	2 Sim. 213	801
——— *v.* Liverpool and Great Western Steam Company	L. R. 9 Q. B. 546	840
Termagant (The) *v.* Page, Son & East	19 Com. Cas. 239	527
Tetley, In re	[1923] 1 Ch. 258	498
Thames and Mersey Marine Insurance Company *v.* Gunford Ship Company	[1911] A. C. 520	434
——— *v.* Hamilton, Fraser & Co.	12 App. Cas. 484	449
Thom *v.* Sinclair	[1917] A. C. 127	63, 303
Thompson *v.* Hopper	6 E. & B. 172, 937; E. B. & E. 1038	435
——— *v.* Powles	2 Sim. 194	802
——— *v.* Whitehead	24 D. 331	821
Thorsa (The)	[1916] P. 257	523
Tolhurst *v.* Associated Portland Cement Manufacturers	[1903] A. C. 414	6
Trim Joint District School Board of Management *v.* Kelly	[1914] A. C. 667	436
Trinder, Anderson & Co. *v.* Thames and Mersey Marine Insurance Company.	68 L. J. (Q. B.) 802; [1898] 2 Q. B. 114	435, 469
Tuff *v.* Warman	5 C. B. (N. S.) 573	415
Tupper *v.* Tupper	1 K. & J. 665	656

U.

Union Colliery Company *v.* Bryden	[1899] A. C. 580	204, 331
University of London Press *v.* University Tutorial Press	[1916] 2 Ch. 601	2
Upperton *v.* Union Castle Mail Steamship Company	8 Com. Cas. 96; 9 Com. Cas. 50	524, 536

V.

Van Gelder, Apsimon & Co. *v.* Sowerby Bridge United District Flour Society	44 Ch. D. 374	5
Vavasseur *v.* Krupp	9 Ch. D. 351	802
Venkatanarayana Pillai *v.* Subbammal	L. R. 43 Ind. Ap. 20	671
Windomora (The)	[1891] A. C. 1	287

W.

		PAGE
Wade *v.* Cockerline	10 Com. Cas. 47, 115	526
Wales *v.* Lampton and Hetton Collieries	10 B. W. C. C. 527	304
Walker, In re	53 L. T. 660	690
——— *v.* Baird	[1892] A. C. 491	800
Wallace & Brown *v.* Robinson, Fleming & Co.	22 S. L. R. 830	516
Wallis, Son & Wells *v.* Pratt & Haynes	[1910] 2 K. B. 1003; [1911] A. C. 394	46
Walsh *v.* Whiteley	21 Q. B. D. 371	598
Walter and Gould *v.* King	13 Times L. R. 270	569
Walton *v.* Tredegar Iron Company	6 B. W. C. C. 592	62
Ward, Lock & Co. *v.* Long	[1906] 2 Ch. 550	4
Waring *v.* Ward	7 Ves. 332	179
Watson *v.* Swann	11 C. B. (N. S.) 756	297
Watson & Co. *v.* Shankland	10 M. 142; L. R. 2 H. L. Sc. 304; 11 M. (H. L.) 51	227, 238
Webb *v.* Herne Bay Commissioners	L. R. 5 Q. B. 642	961
——— *v.* Outrim	[1907] A. C. 81	1000
Wedgwood, In re	[1915] 1 Ch. 113	498
Weems *v.* Mathieson	4 Macq. 215	605
Welde *v.* Welde	2 Lee, 580	696
West Surrey Water Company *v.* Chertsey Union	[1894] 3 Ch. 513	910
Whincup *v.* Hughes	L. R. 6 C. P. 78	981
White *v.* Avery	1916 S. C. 209; 6 B. W. C. C. 663	304
Whiteman *v.* Sadler	[1910] A. C. 514	969
Whitlieburn (The)	9 Asp. M. L. C. 154	408
Wildcroft (The)	201 U. S. 378	104
Wilkinson *v.* Unwin	7 Q. B. D. 636	628
Willetts *v.* Watt & Co.	[1892] 2 Q. B. 92	595
Williams *v.* Llandudno Coaching and Carriage Company	[1915] 2 K. B. 101	312
Wilson *v.* Jones	L. R. 2 Ex. 139	438
——— *v.* United Counties Bank	[1920] A. C. 102	137
——— *v.* Xantho (Owners of Cargo)	12 App. Cas. 503	448
Wiseman *v.* Montreal (City)	Q. R. 60 S. C. 284	187
Wolveridge *v.* Steward	1 Cr. & M. 644	179
Wolverton (Lord) *v.* Attorney-General	[1898] A. C. 535	589
Wright & Greig *v.* M'Kendry	56 S. L. R. 39; 11 B. W. C. C. 402	304
Wynstanley *v.* Lee	2 Swanst. 333	855

Y.

Yangtsze Insurance Association *v.* Lukmanjee	[1918] A. C. 585	296
Yearwood's Trusts, In re	5 Ch. D. 545	690
Yenidje Tobacco Company, In re	[1916] 2 Ch. 426	784
Yrisarri *v.* Clement	2 C. & P. 223; 3 Bing. 432	801

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

PERFORMING RIGHT SOCIETY, LIMITED . . . . . } APPELLANTS ;

AND

LONDON THEATRE OF VARIETIES, LIMITED . . . . . } RESPONDENTS.

H. L. (E.)*
1923
Nov. 5.

Copyright—Assignment of, in future Works—Action by Assignee for Infringement—Injunction—Right to sue without joining Assignor—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 5, 6—*Trade Union—Society for Protection of performing Rights of Members—Restrictions on Conduct of Members' Trade or Business—Trade Union Act*, 1913 (2 & 3 *Geo.* 5, *c.* 30), *ss.* 1, 2.

The plaintiff society, which was registered under the Companies Acts as a company limited by guarantee, was formed for the purpose of

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* *Present:* VISCOUNT CAVE L.C., VISCOUNT FINLAY, LORD ATKINSON, LORD SUMNER, and LORD PHILLIMORE.

H. L. (E.)

1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

enforcing on behalf of its members, being the composers, authors, publishers or proprietors of musical, literary or dramatic works, who alone were eligible as members, all rights and remedies in respect of the public performance of their works. By the articles of association every member who was a publisher undertook during the period of his membership to assign to the society his interest present and future in the performing rights of any works which had been or should thereafter be published by him, and invested the society with the sole right to authorize or forbid the public performance of any such works.

In 1916 a firm of music publishers, being members of the plaintiff society, assigned by deed to the society the performing right of every song the right of performance of which they then possessed or should thereafter acquire, to be held by the society for the period of the assignors' membership. Subsequently a certain song was written, and the copyright in it, together with the right of performance, was assigned by the author to the said firm. The defendants, music hall proprietors, permitted this song to be publicly sung in their music hall without the consent of the plaintiff society, who sued the defendants for infringement of their performing rights. The plaintiffs claimed an injunction and damages, but they ultimately abandoned their claim for damages:—

Held, that, the interest of the plaintiffs in the performing rights being equitable only, they were not entitled to obtain a perpetual injunction against an infringement of their rights without joining the legal owners of the copyright as parties to the action.

Mawman v. *Tegg* (1826) 2 Russ. 385; *Sweet* v. *Shaw* (1839) 3 Jur. 217; *Sweet* v. *Cater* (1841) 11 Sim. 572; and *Bohn* v. *Bogue* (1846) 10 Jur. 420 distinguished.

Colburn v. *Duncombe* (1838) 9 Sim. 151; *E. M. Bowden's Patents Syndicate* v. *Herbert Smith & Co.* [1904] 2 Ch. 86; and *University of London Press* v. *University Tutorial Press* [1916] 2 Ch. 601 approved.

Dictum of Lord Macnaghten in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* [1905] A. C. 454, 462 explained and distinguished.

The plaintiff society was not a trade union: so *held* by the Lord Chancellor, Viscount Finlay, Lord Sumner and Lord Phillimore, Lord Atkinson not dealing with this point.

Performing Right Society v. *Edinburgh Magistrates* 1922 S. C. 165 approved.

Decision of the Court of Appeal [1922] 2 K. B. 433 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Branson J. (2)

The facts are stated in the report of the case before the Court of Appeal and in the judgment of the Lord Chancellor. The facts relating to the constitution and objects of the appellant society are summarized in the headnote, but the following summary of the circumstances directly leading up to the present litigation may be found useful.

(1) [1922] 2 K. B. 433. (2) [1922] 1 K. B. 539.

By an indenture dated June 26, 1916, Chappell & Co., being members of the appellant society, assigned to the society all the right of performance of each and every song, with the words thereof, the right of performance of which then belonged to or should thereafter be acquired by Chappell & Co. during the continuance of their membership of the appellant society, to be held by the society for the period of the assignors' membership.

By an indenture dated July 30, 1918, the appellant society obtained a similar assignment from Keith, Prowse & Co., also members of the society.

In 1919 a song called "The Devonshire Wedding" was written and composed by Mr. Howard Fisher, who assigned the copyright therein, together with the sole right of representation, to Chappell & Co.

In the same year Mr. Jean Lensen, the author and composer of a song called "Love in Lilac Time," assigned the copyright in the song in similar terms to Keith, Prowse & Co.

In November, 1920, the respondents, music hall proprietors, allowed these songs to be publicly sung at one of their music halls without the licence of the appellants.

The appellants thereupon brought an action against the respondents for infringement of copyright, claiming an injunction and damages. The substantial questions at issue in the action were: (1.) whether the appellants, having an equitable interest only in the performing rights of the songs in question, had any title to sue either for a perpetual injunction or for damages in the absence of the legal owners of the copyright; (2.) whether the appellants were a trade union within the meaning of the Trade Union Acts, 1871 to 1913, so that their registration as a company was avoided and they had no legal existence.

Branson J. decided both questions in favour of the appellants, and he granted an injunction and assessed the damages at 40*s*.

The Court of Appeal (Bankes, Atkin and Younger L.JJ.) held (1.) that the appellants were not a trade union, but (2.) that they had no title to sue in the absence of

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

the publishers, and that the action, as constituted, failed.

In the appeal to this House the claim for damages was abandoned.

April 23, 24, 27. *Maugham K.C.* and *Hon. S. O. Henn Collins* for the appellants. The assignments of June 26, 1916, and July 30, 1918, of performing rights not then vested in the assignors operated in equity as present assignments of the rights as and when they accrued to the assignors respectively: *Holroyd* v. *Marshall* (1); *Tailby* v. *Official Receiver* (2); *In re Lind.* (3) [They also referred on this point to *Metcalfe* v. *Archbishop of York.* (4)] The appellants are therefore equitable assignees of these performing rights. It has been established by a long series of cases that an action for an injunction to restrain an infringement of copyright can be brought by an equitable owner in his own name: *Sweet* v. *Shaw* (5); *Bohn* v. *Bogue* (6); *Hodges* v. *Welsh* (7); *Mawman* v. *Tegg* (8); *Sweet* v. *Cater* (9); *Ward, Lock & Co.* v. *Long.* (10) It may be objected that no reported case can be found where a perpetual injunction has been granted to an equitable assignee, but this is not difficult to explain. The old practice of the Court of equity was to grant an interlocutory injunction to an equitable assignee of the copyright and to require the defendant in the action at law, which was formerly necessary, to admit for the purposes of the action the plaintiff's title, so that the only issue to be tried was the issue of infringement, and when that was proved the perpetual injunction would follow as a matter of course. In *Colburn* v. *Duncombe* (11) Shadwell V.-C. held that a bill by an equitable owner of copyright was demurrable, because the author was not a party to the suit, but it is

(1) (1862) 10 H. L. C. 191, 211, 225.
(2) (1888) 13 App. Cas. 523, 531, 533, 543.
(3) [1915] 2 Ch. 345.
(4) (1836) 1 My. & Cr. 547.
(5) 3 Jur. 217, 220; 8 L. J. (Ch.) 216.
(6) 10 Jur. 420, 421.
(7) (1840) 2 Ir. Eq. Rep. 266, 287–8.
(8) 2 Russ. 385, 401–2.
(9) 11 Sim. 572.
(10) [1906] 2 Ch. 550, 557, 562.
(11) 9 Sim. 151.

difficult to discover precisely what the Vice-Chancellor really intended to decide in that case, having regard to his subsequent decision in *Sweet* v. *Cater*. (1) The appellants do not now make any claim for damages. If they did, the respondents might object that they were not protected from an action by a third party. Non constat that the publishers might not sue them and recover another 40*s*., and the same argument would apply to a claim for an account. But there can be no possibility of duplication where the claim is for an equitable remedy to protect the interest of the equitable owner. In the analogous case of an infringement of a patent it has been held that a mortgagor may sue for an injunction without joining the mortgagee: *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge United District Flour Society* (2); and see *Fairclough* v. *Marshall*. (3) *E. M. Bowden's Patent Syndicate* v. *Herbert Smith & Co.* (4), where it was held that an equitable assignee of a patent could not sue for an injunction to restrain an infringement without joining the legal owner, was, it is submitted, wrongly decided. In Story on Equity Jurisprudence, 13th ed., vol. ii., p. 240, § 935, in Copinger on Copyright, 5th ed., p. 195, and in Joyce on Injunctions (1872 ed.), vol. i., p. 289, the law is laid down in the manner contended for by the appellants; there is no suggestion that the right to relief is limited to interlocutory injunctions: see also *Grace* v. *Newman*. (5) If before the Judicature Act, 1873, an equitable owner of copyright could sue for an injunction, that Act, so far from diminishing that right, has increased it: see s. 25, sub-s. 8. Nor does the Copyright Act, 1911, contain anything to deprive an equitable assignee of his right to an injunction. [They referred to *University of London Press* v. *University Tutorial Press* (6) and *Macdonald* v. *Eyles*. (7)] The objection that the appellants ought to add as parties to the action persons who, having parted with their rights for valuable consideration,

(1) 11 Sim. 572.
(2) (1890) 44 Ch. D. 374, 390.
(3) (1878) 4 Ex. D. 37.
(4) [1904] 2 Ch. 86, 91.
(5) (1875) L. R. 19 Eq. 623, 626.
(6) [1916] 2 Ch. 601, 612.
(7) [1921] 1 Ch. 631, 638-9.

H. L. (E.) 1923 — PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

have no longer any interest in the matter is a purely technical defence raised by infringers. No action is now dismissed for want of parties, and it is not necessary to add formal parties who have really no interest in the subject matter of the action : *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (1) ; *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (2)

[LORD PHILLIMORE referred to *Gurney* v. *Longman* (3) and *Millar* v. *Taylor.* (4)]

Further, an equitable assignment such as the assignments in the present case—i.e., an assignment of future rights, is an assignment within the meaning of s. 5, sub-s. 2, of the Copyright Act, 1911. Sect. 31 takes account of equitable considerations and shows that the draftsman contemplated equitable assignments.

Cyril Atkinson K.C. and *Clement Davies* for the respondents. The appellants cannot obtain a perpetual injunction in the absence of the legal owners, because under the Copyright Act, 1911, no one but the owner is entitled to sue for infringement. The Act gets rid of the necessity for registration and deals with ownership, which means legal ownership. In respect of the same right there can only be under the Act one owner. Whatever be the effect of the agreements to assign of June 26, 1916, and July 30, 1918, they do not affect the ownership of the copyrights. Sect. 5 merely authorizes the assignment of something in existence. The documents in question, until the subject matters came into existence, were not assignments, but were merely contracts. Sect. 6 gives to the owner of the copyright all the remedies conferred by law for the infringement of a right. Why then are the appellants not entitled to damages, as it is now admitted that they are not ? It is because they are not the owners. " Owner " means the person recognized by law as owner. Sect. 31 was inserted for the express purpose of making it clear that a person having an equitable interest could not sue. The final words of the section do not touch the present

(1) [1903] A. C. 414, 424.
(2) [1905] A. C. 454, 462.
(3) (1807) 13 Ves. 493.
(4) (1769) 4 Burr. 2303.

case. At the lowest the legal owners must be before the Court—i.e., here the publishers, who are described on the music as the owners of the copyright. The question falls to be determined under the words of the Act. As to the authorities. In Daniell's Chancery Practice, vol. ii. (1845 ed.), p. 1512; (1914 ed.), p. 1273, the law with reference to the title to sue in a copyright action is thus laid down: "The title . . . . must be a legal and not an equitable one; it must be something more than an agreement to assign, or a writing which evidences the intention of the parties; for a bill cannot be sustained unless the person who has the legal title is brought before the Court"; and *Colburn* v. *Duncombe* (1) is cited in support of that proposition. That is the only case in which the point has been considered otherwise than upon a motion for an interlocutory injunction, and there the bill was held to be demurrable because the plaintiff was not the legal owner. In that case an interlocutory injunction had been granted, no doubt for the reason that an interlocutory injunction is granted solely upon the principle of preserving the property pending the decision of the legal rights at the hearing of the action. Until the hearing a colour of title is sufficient. On the other hand a perpetual injunction involves the determination of rights, and when it comes to a question of rights the plaintiff has no right unless he has the legal ownership. All the authorities proceed upon this view. *University of London Press* v. *University Tutorial Press* (2) supports the respondents' case. That was an action brought by equitable assignees of the copyright in certain examination papers, and Peterson J. there decided that in order to sue for the infringement of the copyright the plaintiffs must either obtain a proper assignment of the copyright or join the examiners, who were the legal owners of the copyright, as parties. The relief granted by the same judge in *Macdonald* v. *Eyles* (3) was not based upon any equitable title to the copyright, but proceeded upon *De Mattos* v. *Gibson*. (4) A person cannot be entitled by assignment to copyright except

(1) 9 Sim. 151.
(2) [1916] 2 Ch. 601, 612.
(3) [1921] 1 Ch. 631.
(4) (1859) 4 De G. & J. 276.

H. L. (E.) 1923 PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

by an assignment under the Act. An equitable assignment does not pass ownership but passes only an equitable interest, and the Copyright Act deals with ownership: *Durham Brothers* v. *Robertson* (1); *In re Clarke* (2); *Joseph* v. *Lyons*. (3) Further, the appellant society is a trade union within the statutory definition of the term: Trade Union Act Amendment Act, 1876, s. 16; Trade Union Act, 1913, s. 1, sub-ss. 1 and 2; s. 2, sub-s. 1; and, if so, it is conceded that the registration of the society under the Companies Acts is void. This society is a trade union, because one of its principal objects is to impose restrictive conditions upon the trade or business of a publisher. It is a regular part of a publisher's business to make money by securing the performance of the works the copyright in which he has acquired. Apart from this society, a publisher may make such terms as to performance as he pleases, and by joining this society a restrictive condition is imposed upon his business, since he thereby gives up his right to authorize the public performance of works of which he is the proprietor during the period of his membership. *Performing Right Society* v. *Edinburgh Magistrates* (4) is, it is submitted, wrongly decided.

Maugham K.C. in reply was directed to confine himself to the question of the right of the appellants to sue in their own name.

The appellants are assigns of the performing rights within the Copyright Act, 1911, and are therefore entitled under the Act to sue for an injunction to restrain an infringement of their rights. Sect. 5, sub-s. 2, is not intending to lay down an inclusive statement of all the ways in which copyright may be acquired. Take the case of an executor or a trustee in bankruptcy. In neither of those cases is there an assignment in writing. The Act does not distinguish between legal and equitable interests; all that the Act requires is that there should have been an assignment by the person having

(1) [1898] 1 Q. B. 765, 769. 36 Ch. D. 348, 355.
(2) (1887) 35 Ch. D. 109, 112; (3) (1884) 15 Q. B. D. 280, 284.
(4) 1922 S. C. 165.

the substantial interest in the copyright. [He referred to *Sims* v. *Marryat*. (1)]

The House took time for consideration.

1923. Nov. 5. VISCOUNT CAVE L.C. My Lords, this appeal from the Court of Appeal in England raises the question whether the appellant society, which is entitled in equity to the performing rights in certain musical works, can obtain a perpetual injunction against an infringement of those rights by third parties without joining the legal owners of the copyright as parties to the action.

The society was registered in the year 1914 under the Companies Acts as a company limited by guarantee, its principal object being "to exercise and enforce on behalf of members of the company, being the composers of any musical works or the authors of any literary or dramatic works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyrights in such works, all rights and remedies under the Copyright Act, 1911, or otherwise in respect of the public performance of their works." It was provided by the society's articles of association that every member who was a publisher should, during the period of his membership, assign to the company his interest, whether present or future, in the right to perform any musical or dramatic work which had been or should be published by him, and that until such assignment and so far as it might not extend every such member invested the company during the period of his membership with the right in his name to institute proceedings against all persons performing such works without authority. The society was to have the sole right of authorizing or forbidding the public performance of any works published or to be published by a member who was a publisher, of granting licences for the public performance of such works, and of collecting fees for the performance of any such works and damages and

(1) (1851) 17 Q. B. 281.

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Viscount Cave, L.C.

compensation for unauthorized performances. The net moneys so received, after providing for expenses and a reserve fund, were to be distributed among the proprietors in accordance with rules to be made by the society. Rules were made accordingly, but it is unnecessary to refer to them in detail. It appears that the society has nearly 500 members (persons, firms, or companies) and controls the performing rights in over a million musical works. The practice of the society is to grant general licences to perform all or any of the works under its control to the proprietors of theatres, music halls and other places of entertainment at an inclusive fee, and it is said that the number of such general licences exceeds 4000.

In the year 1916 Messrs. Chappell & Co., Ld., the well-known music publishers, became members of the society; and by an indenture dated June 26, 1916, Chappell & Co., Ld. (therein called "the assignor"), in accordance with the articles of association, assigned to the society (among other things) "the right of performance in all parts of the world of each and every song with the words thereof or musical work (not being a musical play) the right of performance of which then belonged to, or should thereafter be acquired by or be or become vested in, the assignor during the continuance of the assignor's membership of the Society," such rights to be held by the society for the period of the assignor's membership. In consideration of this assignment the society covenanted with the assignor to collect and pay to the assignor in respect of the said performing rights, such sums of money out of the moneys collected by the society in respect of the public performances of the works of its members as should represent the share of the assignor therein, in accordance with the rules of the society for the time being in force. On January 3, 1919, Mr. W. Howard Fisher, the author and composer of a song then called "My Wedding" or "Down Exeter Way," but afterwards known as "The Devonshire Wedding," assigned the copyright and sole right of representation of that song to Chappell & Co., Ld., in consideration of a cash payment and a royalty. Chappell &

Co., Ld., had until the date of this assignment no interest in the song.

In the year 1918 Messrs. Keith, Prowse & Co., Ld., also well-known music publishers, became members of the society, and by an indenture dated July 30, 1918, which was in like form with the deed executed by Messrs. Chappell & Co., they assigned to the society the right of performance of the music of every song or musical work (not being a musical play) the right of performance of which belonged to or should thereafter be acquired by or be or become vested in them during the continuance of their membership of the society, such rights to be held by the society for the period of their membership. On January 24, 1919, Mr. J. Lensen, the author of a song then called "Lullaby" but afterwards "Love in Lilac Time," assigned to Messrs. Keith, Prowse & Co., who until then had no interest in the song, his copyright and performing rights in the song.

On November 1, 1920, the respondents, who had previously held a licence from the society to perform at their places of entertainment any musical works controlled by the society, but who then had no such licence, caused "The Devonshire Wedding" and "Love in Lilac Time" to be played and sung at one of their music halls. There was some suggestion in the action that the publishers, Messrs. Chappell & Co. and Messrs. Keith, Prowse & Co., had authorized the performance of the songs; but this was not clearly established, and if any authority was given it can hardly be doubted that it was intended to be conditional on the consent of the society being obtained.

After some correspondence, the society on November 17, 1920, commenced this action against the respondents, claiming an injunction to restrain the respondents from performing the above-mentioned songs in public without the leave of the society and damages for infringement of their copyright. The respondents in their defence denied the plaintiffs' title, and further pleaded that the plaintiffs were a trade union within the meaning of the Trade Union Acts, 1871 to 1913, and that as such their registration and incorporation as a

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Viscount Cave L.C.

company was void and unlawful. The action was heard by Branson J., who gave judgment for the plaintiffs for an injunction and damages, holding that the society was not a trade union, and that, although the equitable owner only of the performing rights, it was entitled to the relief claimed. On appeal the Court of Appeal (Bankes, Atkin and Younger L.JJ.), while agreeing with the learned judge in his decision that the society was not a trade union, held that the society, being the owner in equity only of the performing rights, could not obtain either damages or a perpetual injunction without adding the legal owners of those rights as parties to the action. The appeal was accordingly allowed and the judgment of Branson J. set aside; but it was ordered that the plaintiffs be at liberty, within fourteen days of the date of the order, to elect to amend the writ and all subsequent proceedings in the action by adding the legal owners of the copyright of the songs as co-plaintiffs, and in that event should pay the costs thrown away, including the costs of the appeal. The appellants, although under their articles of association and the indentures above referred to they were entitled without further authority to add the two publishing firms as co-plaintiffs, declined so to do and presented the present appeal to this House.

My Lords, it is convenient to deal first with the question whether the appellants, not having added the owners of the performing rights as parties to the proceedings, can obtain the relief sought. It was not maintained before your Lordships that the appellants could obtain an order for damages; but it was argued that they could claim the injunction sought, and that on two grounds.

First, it was said that by virtue of the two indentures of June 26, 1916, and July 30, 1918, above referred to, the appellants were the assigns of the performing rights within the meaning of s. 5, sub-s. 2, of the Copyright Act, 1911, and accordingly were entitled under s. 5, sub-s. 3, and s. 6 of the Act to the injunction claimed. If this were so, the appellants would be entitled, not only to an injunction, but also to damages; but in fact it appears to me that there is

no foundation for the contention. Sect. 5, sub-s. 2, of the Act provides that the author of a work may assign the copyright either wholly or partially and may grant any interest in the right by licence, but that " no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made or by his duly authorised agent." Whether a document passing only an equitable interest in an existing copyright, if signed by the person who was then the owner of the right, would be an assignment within the section, it is not necessary to determine, for no such question arises in the present case. There was on the respective dates of the instruments under which the appellants claim no existing copyright in the songs in question, and therefore no owner of any such right; and this being so, neither of those instruments can be held to have been an assignment " signed by the owner of the right " within the meaning of the section. No doubt when a person executes a document purporting to assign property to be afterwards acquired by him, that property on its acquisition passes in equity to the assignee: *Holroyd* v. *Marshall* (1); *Tailby* v. *Official Receiver* (2); but how such a subsequent acquisition can be held to relate back, so as to cause an instrument which on its date was not an assignment under the Act to become such an assignment, I am unable to understand. The appellants have a right in equity to have the performing rights assigned to them and in that sense are equitable owners of those rights; but they are not assignees of the rights within the meaning of the statute. This contention therefore fails.

But secondly, it was strenuously argued that apart from the statute the society, although equitable owners only of the copyright, could sue for a perpetual injunction without adding the legal owners either as plaintiffs or defendants; and counsel for the appellants went so far as to contend that since the fusion of law and equity by the Judicature Acts an equitable owner of property can in every case sue for and obtain a perpetual injunction for the protection of such

(1) 10 H. L. C. 191. (2) 13 App. Cas. 523.

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Viscount Cave L.C.

property without joining the legal owner as a party. I am unable to take that view. That an equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction, is not in doubt; but it was always the rule of the Court of Chancery, and is, I think, the rule of the Supreme Court, that, in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action: Daniell's Chancery Practice, 7th ed., vol. i., p. 172. If this were not so, a defendant after defeating the claim of an equitable claimant might have to resist like proceedings by the legal owner, or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied. No doubt the rule does not apply to a mortgagor, at least since the passing of s. 25, sub-s. 5, of the Judicature Act, 1873; and there may be special cases where it will not be enforced, as in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1), where the defendant disclaimed any wish to have the legal owners made parties. Further, under Order XVI., r. 11, no action can now be defeated by reason of the misjoinder or non-joinder of any party; but this does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case. Subject to these observations, I think that the general rule is still operative, that it was properly applied to the case of a patent in *E. M. Bowden's Patents Syndicate* v. *Herbert Smith & Co.* (2) and to the case of a copyright in *University of London Press* v. *University Tutorial Press* (3), and that it applies in the present case.

It was argued that, whatever may be the general rule, there is authority showing that the equitable owner of a copyright is entitled to an injunction against infringement, and reference was made to Lord Eldon's decisions in

(1) [1905] A. C. 454, 462. (2) [1904] 2 Ch. 86.
(3) [1916] 2 Ch. 601.

Universities of Oxford and Cambridge v. *Richardson* (1) and *Mawman* v. *Tegg* (2), and to those of Shadwell V.-C. in *Sweet* v. *Shaw* (3); *Sweet* v. *Cater* (4); and *Bohn* v. *Bogue.* (5) But in all these cases the injunction granted was interlocutory only and pending the decision of an action at law, and there is nothing to show that on the bills coming up for further consideration permanent relief was, or would have been, granted without proof of the plaintiffs' legal title. On the other hand, in *Colburn* v. *Duncombe* (6) Shadwell V.-C. allowed a demurrer to the bill on the ground that the legal owner was not a party; and in Mitford's Chancery Pleadings, 5th ed. (1847), p. 418, it is stated in terms that "the author of a work is a necessary party to a suit by the publisher to restrain an invasion of the copyright, where no actual assignment has been made of the copyright, but only an agreement to assign or dispose of it, and where, consequently, the legal title to the copyright remains in the author." The decisions quoted are, therefore, no authority for the appellants' claim.

For the above reasons, I am of opinion that the appellants are prevented by the law and practice of the Courts from obtaining the perpetual injunction which they claim; and this being so, it is unnecessary to deal at length with the contention of the respondents that the society is a trade union, and on that ground unable to sue. As to this point, it is sufficient to say that I agree with the reasoning and conclusions of the Court of Session, who in *Performing Right Society* v. *Edinburgh Magistrates* (7) held the appellant society not to be a trade union, and with the judgments of Branson J. and the Court of Appeal in the present case. In my opinion this appeal fails and should be dismissed with costs.

VISCOUNT FINLAY. My Lords, it is unnecessary to restate the facts of this case. The objection to the right of the society to maintain the action is that they have only an equitable title

(1) (1802) 6 Ves. 689.
(2) 2 Russ. 385.
(3) 3 Jur. 217.
(4) 11 Sim. 572.
(5) 10 Jur. 420.
(6) 9 Sim. 151.
(7) 1922 S. C. 165.

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Viscount Finlay.

and that the legal owner ought to have been joined. The society were afforded by the Court of Appeal the opportunity of amending by joining the legal owner upon terms, but they refused to accept this offer and have taken their stand upon their supposed right to sue alone in virtue of their equitable title.

The society was formed for the protection of copyright in music and songs, and its members are authors, publishers and other owners of copyright in such productions. It had been found that a great deal of piracy of the right of representation of such works was carried on with impunity owing to the inability or reluctance of individual owners of such copyright to take proceedings. The machinery adopted was to vest in the society the copyrights of all members, leaving it to the society to see that no performance took place without a licence from the society, and to collect the fees payable for such licences for division among the members of the society.

In this action the society had claimed an injunction and damages. The claim for damages was withdrawn, as it was admitted that for this purpose the presence of the owner of the legal estate would be necessary to avoid the possibility that payment might be made to the wrong person. On the other hand, the right of the society to an interlocutory injunction for the protection of the property pendente lite was not questioned. But it was maintained by the defendants that it was impossible in the circumstances of the present case to grant a perpetual injunction at the instance of a plaintiff who was merely an equitable owner. Whether this contention of the defendants is right is the question on this appeal.

The action was brought to restrain the unlicensed performance of two songs with their accompaniments—"Love in Lilac Time" and "A Devonshire Wedding"—copyrights in which were vested in Messrs. Chappell & Co. and Messrs. Keith, Prowse & Co. by assignments from the authors dated January 3, 1919, and January 24, 1919, respectively. Both of these firms are members of the society and had executed

general assignments to it dated June 26, 1916, and July 30, 1918, of the right of performance of each and every musical work, the right of performance of which belonged to or should thereafter be acquired by or become vested in the assignor during the assignor's membership of the society, the society covenanting to collect the fees and pay over his share thereof to the author. At the date of this general assignment the songs and music in question had not been composed, and when they did come into existence they were assigned, as already stated, to the two firms in January, 1919.

The assignment to the society by the two firms of the performing rights with regard to these two songs was invalid at common law. The property in the copyright was not acquired by the assignors until dates subsequent to those of the general assignments made by them as members to the society, and the common law does not recognize as valid any assignment of property to be afterwards acquired by the assignor. But the assignment was good in equity. It was made for valuable consideration, and as soon as Messrs. Chappell and Messrs. Keith, Prowse acquired the copyrights from the authors the prospective assignment which each of them had made to the society attached, and the society became the equitable owner of the performing rights in respect of each of the songs.

The fifth section of the Copyright Act, 1911, enacts that (subject to special provision for cases in which the work was made to order for valuable consideration or was prepared under a contract of service) the author shall be the first owner of the copyright. The copyright in these songs accordingly vested in the authors and was assigned by them to Messrs. Chappell and to Messrs. Keith, Prowse & Co. respectively, who thereby became and are now the legal owners of the whole copyright. The fifth section goes on to provide that the owner of the copyright may assign the right by writing duly signed, and where there is a partial assignment the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, is the owner of the copyright for the purposes of the Act. The thirty-

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Viscount Finlay.

first section provides that no person shall be entitled to copyright or any similar right otherwise than under the provisions of the Act or any other statutory enactment, with a proviso that nothing in this section should be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

In my opinion, the power of assignment given by the fifth section is not confined to an assignment of the legal property, but will apply to the transfer of any interest, whether legal or equitable. It follows that when Messrs. Chappell and Messrs. Keith, Prowse & Co. respectively acquired the copyright in these songs, the equitable interest in the performing rights in respect of them vested in the society as assignees from them. The society became entitled to sue in respect of the interests so acquired, but their right to sue is subject to the general rule that the owner of the legal estate should be joined as a party. It is true that the owner of a merely equitable estate may in certain cases sue alone, as where there are special circumstances which make it inconvenient that the owner of the legal estate should sue, or where his conduct with reference to the estate is in question. But there is no case in which it has been held that the presence of the legal owner in an action against a third party can be dispensed with on such grounds as those which are alleged in the present case.

It was urged that it would give a great deal of trouble to join the legal owner, and that the society, as owners of the equitable right, should be deemed competent to sue alone. It is said that the appellants have the copyright in more than a million works, consisting chiefly of popular light music. It would, of course, be extremely troublesome and expensive to take legal assignments from the members of the copyright in each song or piece of music as it comes into existence. But it would not be difficult for the society before suing to take from the member a special assignment conveying the legal interest in respect of any work which is about to become the subject of litigation, or to get him to join as a plaintiff or in case of refusal by him to add him as a

defendant, and if, for any reason, all this were impossible, the action might be allowed to proceed without the presence of the legal owner. Except under very special circumstances the ordinary rule should be observed, that the legal owner should be a party to the proceedings. There may possibly be cases in which a person who has made an equitable assignment might by a subsequent assignment have transferred the legal interest in the same work to a purchaser for value without notice, whose title would prevail over the merely equitable right, and such a possibility is one reason for the rule of making the legal owner a party. But whatever may be the balance of convenience, the established rules of practice should be adhered to, even in cases, of which I think the present is one, when their observance in all probability will serve no useful purpose. The parties have joined battle on the applicability to the present case of this particular rule of practice, and we must decide according to law, however much we may regret that success in the action should depend upon a mere technicality which has no relation to the merits of the case.

A great many authorities have been cited in your Lordships' House in the course of the argument. It is unnecessary to go through them again. I think that in what I have already said, I have sufficiently stated the general effect. The appellant society particularly relied upon three cases before Shadwell V.-C.: *Sweet* v. *Shaw* (1); *Sweet* v. *Cater* (2); and *Bohn* v. *Bogue*. (3) These three cases arose on applications for an interlocutory injunction. An order was made in each, which restrained the defendant at the trial at law from raising the point that the legal property was not in the plaintiff. This, however, was for purposes of the interlocutory injunction, and it does not appear that the Vice-Chancellor would have granted any perpetual injunction without the presence of the owner of the legal estate; on this point there is no report. The appellant society also relied upon *Mawman* v. *Tegg* (4), but that also was a case of interlocutory

(1) 3 Jur. 217.
(2) 11 Sim. 572.
(3) 10 Jur. 420.
(4) 2 Russ. 385.

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Viscount Finlay.

injunction and the suit was compromised without coming to trial. Some observations made by Lord Macnaghten in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1) were, it was argued, inconsistent with the claim of the defendant in the present case to have the suit dismissed owing to the non-joinder of the owner of the legal estate. I do not think that these observations should be read as overruling the general rule of practice as to the necessity of joining the owner of the legal estate and the right of the defendant to have the suit dismissed if the plaintiff refuses or neglects to join him in any case not falling within the recognized exceptions to the rule.

It is unnecessary to say anything of the other defences raised. The contention in para. 2 of the defence that the plaintiff society is a trade union and that therefore their registration and incorporation as a company are void and unlawful does not bear examination.

In my opinion, the appeal should be dismissed with costs.

LORD ATKINSON. My Lords, the facts have been already fully stated. I think it is quite possible to decide this appeal on the terms of the Copyright Act of 1911 without entrenching to any degree upon the general principles laid down by Lord Macnaghten in the cases of *Tailby* v. *Official Receiver* (2), and *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1), authorities, naturally, much relied upon by the appellants. I arrive at that conclusion because it appears to me that the express provisions of this Copyright Act render these principles inapplicable to the present case. That statute is entitled "An Act to amend and consolidate the Law relating to Copyright." By its thirty-sixth section it repeals entirely thirteen statutes dealing with copyright, extending from the 8 Geo. 2, c. 13, passed in the year 1734, up to and inclusive of the 15 & 16 Vict. c. 12, passed in the year 1852. In addition it repeals the whole of the International Copyright Act passed in 1875, the Copyright (Musical Compositions) Act passed in 1882, the International Copyright Act passed

(1) [1905] A. C. 454, 462. (2) 13 App, Cas. 523.

in 1886, and the Copyright (Musical Compositions) Act passed in 1888. It repeals in part other statutes, the Fine Arts Copyright Act passed in 1862, the Customs Consolidation Act passed in 1876, and the Revenue Act passed in 1889, while its thirty-first section runs as follows: "31. No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence."

These later provisions would in themselves suggest that the Legislature considered that it had done what the title of the statute would suggest it had intended to do—namely, to consolidate, and embody within the four corners of this Act, what was thereafter to be taken to be the law as regards copyright. The special provisions dealing in detail with the creation of copyright, its assignment, its infringement, and with the persons in whom the right to copyright must be vested in order to be protected would appear to lead to the same conclusion. By s. 1, sub-s. 2, "copyright" for the purposes of the Act is defined to mean the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in case of a lecture, to deliver, the work or any substantial part thereof, in public; if the work is unpublished, to publish the work or any substantial part thereof. This last provision, in my view, obviously applies to a work which though unpublished at the time is in existence. The section then proceeds to describe the things which this definition is to include. In sub-head (*d*) it provides that in a case of a literary, dramatic or musical work it includes the sole right to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered, and also the sole right to authorize any of the aforesaid acts. The definition could not well be wider. In the following sub-section—namely, sub-s. 3 of s. 1—

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Lord Atkinson

publication is for the purposes of the Act defined in relation to any work to mean the issue of copies of the work to the public, but does not include the performance in public of a dramatic or musical work, the delivery to the public of a lecture, the exhibition in public of an artistic work, the construction of an architectural work of art, or the issue of photographs or engravings of works of sculpture or architectural works.

Sect. 2 deals with infringement. It enacts that "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by the Act conferred on the owner of the copyright." It then proceeds to define negatively this same infringement, by enumerating in great detail the things which do not amount to infringement, and winds up by providing that copyright in a work is to be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright unless the person so acting was unaware, and had no reasonable grounds for suspecting, that the performance would be an infringement of copyright.

Sect. 3 provides that the term "for which copyright shall subsist" shall be the life of the author and fifty years after his death. Sect. 4 deals with the making of an order by the Judicial Committee of the Privy Council compelling the owner of the copyright in a literary, dramatic or musical work which has been published, who, after the death of the author, refuses to grant a licence to reproduce the work, to grant such a licence.

Sect. 5, sub-s. 1, enacts that "Subject to the provisions of this Act the author of a work shall be the first owner of the copyright therein." Certain provisoes follow irrelevant to the present case, and then in sub-s. 2 are found provisions bearing directly, in my view, upon the question in controversy in this appeal. The sub-section provides that the owner of the copyright in any work may assign the right either

wholly or partially, and either generally or subject to limitation to the United Kingdom or to any self-governing Dominion or other part of His Majesty's Dominions to which the Act extends, and either for the whole term of the copyright or for any part thereof, or may grant any interest in the right by licence. The sub-section then proceeds to provide "that no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent." Then follows a proviso to the effect that where the author of a work is the first owner of the copyright thereof no assignment of copyright and no grant of any interest therein made by him (otherwise than by will) after the passing of the Act shall be operative to vest in the assignee or grantee any rights in the work beyond the expiration of twenty-five years from the death of the author, the reversionary interest in the copyright expectant on the termination of this period vesting in the latter's personal representatives.

As the remedies for infringement are expressly given to the owner of the copyright by ss. 2 and 6, and many other sections refer to the owner alone, the following provision is introduced to protect the assignee under any partial assignment. It runs thus: "(3.) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly."

I think the provisions of this sub-section on their proper construction obviously apply only to assignments of things in existence at the date of the assignments and to grants dealing with interests carved out of those existing things at or before the date of the grant. It may be that it would suffice if those interests were only equitable as distinguished from legal. For the purposes of this case it is not necessary to decide that point, and I reserve my opinion upon it, but I think those provisions cannot have any application whatever

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Lord Atkinson.

to assignments or grants of non-existent things, which may never fructify, and which if they do fructify at all can only do so at some future period when the assignor or grantor becomes possessed of or entitled to an interest which will in equity feed his earlier disposition. This conclusion is further indicated by the fact that the equitable interests Lord Macnaghten alludes to may, as the authorities show, be created by parol, whereas the assignments and grants dealt with in this section must, to be valid, be in writing executed by the owner of the right in respect of which the assignment or grant is made or by his agent lawfully authorized. Moreover, the language of the sub-section is general in character. It is not qualified by such words as "for the purposes of this Act."

Sect. 6 secures to the owner of the copyright in any work all the remedies for infringement by way of injunction or interdict, damages, accounts and otherwise as may be conferred by law for the infringement of a right, but this wide enactment is qualified by the words found in the section "except as otherwise provided by this Act." Sect. 8 affords protection to an infringer against any of these remedies, other than by injunction or interdict, if he proves that at the date of the infringement he was not aware and had no reasonable grounds for suspecting that copyright existed in the work. When one reads through all the provisions of this statute and realizes how almost every state of things, every event and contingency, is dealt with and provided for, one is, I think, reasonably led to the conclusion that the supplementary provisions contained in s. 31 were designed to deprive every person of copyright to whom it was not secured by the provisions of the Act of 1911, or by those of some other statute for the time being in force. It is, in my view, impossible to suppose that the mode of acquisition of an equitable interest in copyright under a grant or licence made or given before the author's work or the copyright in it is in existence would have been left unnoticed or unprovided for by this statute as it has been if it had not been intended to exclude and, impliedly, to prohibit it.

Being of this opinion, I think the appeal fails, and that it is therefore unnecessary to consider the point as to the Trade Union Acts. I think the appeal should be dismissed with costs.

LORD SUMNER. My Lords, beyond doubt the appellant association is not a trade union. "The imposition of restrictive conditions on the conduct of a trade or business and the provision of benefits to members" are not "the principal objects" of the combination which it has formed, nor is either of them. Neither is, in my opinion, even an incidental consequence of its operations. It is concerned with the trades of individual music publishers, not with the trade of publishing music as a whole, and those individuals are persons who elect to carry on their trades without trading in the performing rights of such compositions as are their copyright assets for trade purposes. True it is that only persons who carry on a trade thus limited can become members of the association, but as to that they can do as they like. They need not join it, and if they restrict the area of their trades in order to join it, that is their affair. They do so, because they think it worth while to do so, not because they are subjected to restrictive conditions. The association exercises no control over them before they become members, and when they have become members it does not restrict their trades at all. On the contrary, it takes the members as it finds them and assists them by exercising the assigned performing rights for the common good. As for "benefits," none are provided. The members simply get from the association the service and the money returns for the sake of which they joined it. Any restriction is on the membership, not on members' trades.

In the present action the association, which is admittedly only an equitable assignee, had it in its power to join the assignors of the performing rights as plaintiffs and elected not to do so. The consequences of this election have been the principal subject of debate. It is said that the assignors would have been formal parties only; that they claimed and

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Lord Sumner.

had no rights to be enforced, and that the defendants had no answer or interest, which the joinder of the assignors would have enabled or assisted them to establish. As it turns out, provided the action was brought by the right and necessary parties, the defendants had no answer at all, for they failed to prove that such leave as was given by the assignors to the performing artists was anything but a permission to perform, if the music hall was licensed by the association, which it was not, and they did not try to prove their plea that they "were not aware and had no reasonable ground for suspecting, that the performance would be an infringement of copyright." As a matter of fact, part of the infringement—namely, the performance of the band parts—was actually the work of the respondents' own band, employed for that purpose among others.

Copyright, and performing right as part of it, is now so fully regulated by statute, that it is the Copyright Act, 1911, in which, in the first instance, is to be found the solution of the question by what parties should this action have been brought. In fact each party in turn, as an alternative to the main contention in the appeal, claimed the statute as conclusive, in the one case of the right of the assignee to sue and succeed without joining the assignors, in the other of the right of the defendant to claim the judgment, because the statute declares the assignors to be the parties to sue.

The appellants argued that s. 6, sub-s. 1, entitles "owners" to an injunction, and by s. 5, sub-s. 2, they are owners, for a person may become owner by "assignment," and an instrument purporting to assign after-acquired property is undeniably an assignment. According to them copyright is a personal property right, with which strangers have nothing to do except that they infringe it at their peril. Not being a chattel, there is no question of general law about passing the right to it by delivery. Not being a debt—where the obligation of a debtor, a third party, is of the essence and has to be bound—there is no question of rules about notice of assignment. The matter is, therefore, eminently one for exclusive statutory regulation, and this

is found in s. 5, sub-s. 2, where all that is required is a written and signed assignment, without any limitations upon the word. The question is whether there is an "assignment" here, and no one can say that there is not, for the instrument is intended to assign, it purports to assign, and if, in respect of after-acquired property, it is an assignment only in equity, the statute does not exclude equitable assignments, for an assignment, though equitable, is an assignment still.

My Lords, my answer must be that s. 5 does not deal with remedies for infringement, but only with modes of passing title. It is necessary to look to s. 6, sub-s. 1, which declares, possibly superfluously, that the owner of the copyright shall be entitled to all such remedies by way of injunction (which is the sole remedy sought in this case) as are or may be conferred by law. "Conferred by law" clearly means by the legal system existing for the time being and has no reference to the historic distinction between law and equity. Accordingly, though an assignee may acquire title by coming within s. 5, sub-s. 2, there is nothing in that section or in s. 6, sub-s. 1, to exempt him from compliance with existing legal forms, when he comes to seek a remedy conferred by law.

The respondents on the other hand rely on the use of the word "owner" both in s. 5, sub-s. 2, and in s. 6, sub-s. 1, and in many other sections, where it naturally means the person who owns, not the person whom Courts exercising an equitable jurisdiction will assist to become owner or will treat as if he already were owner, though in truth he is not. Here again I have come to the conclusion that the language of the statute does not in itself conclude the matter. A remedy is conferred by our present law on equitable owners, subject to compliance with certain legal requirements, and the owner of copyright is entitled to all remedies. I can find nothing to show any intention in the Act to ignore equitable rights throughout so wide and important a subject as copyright, nor, in view of the long history of equitable rights and of the enactment in favour of the rules of equity contained in the Judicature Act, 1873, does it seem practicable

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Lord Sumner.

to hold that the words "owner" in s. 6, sub-s. 1, and "title" in s. 6, sub-s. 3, mean exclusively legal owner and legal title as those terms were theretofore understood. So limited a meaning of the words would not be a natural one to place on legal language enacted in 1911. Again, I cannot think that s. 5, sub-s. 3, amounts to a statutory direction that assignor and assignee must concur in suing, when there has been an equitable assignment. The partial assignment mentioned in s. 5, sub-s. 2, is, I think, an assignment of part of the whole right, and the grant of an interest by licence is a grant of such interest in the whole as a licence, in contradistinction to an assignment, is capable of giving. The assignor under a legal assignment, which does not divide the property or the right owned into parts, divests himself of the ownership of the whole. When the assignment is equitable, he either divests himself of the whole, in the sense that equity will compel him to do so when called upon, though till then he remains capable of divesting himself or of investing a stranger for value without notice, or else he divests himself of nothing, but retains the whole "legal" ownership till he is called on to part with it. In either case there is nothing partial about it nor anything in the nature of a licence. Accordingly, I think that the statute leaves equitable assignees to enjoy such position as is given to them by the general law, when they require to vindicate the right, which the Copyright Act, 1911, expressly confers and regulates.

My Lords, it appears to be admitted—and the researches of counsel on both sides confirm the admission—that no recorded instance can be found in which an equitable assignee of copyright or of patent rights in an invention has obtained a perpetual injunction to restrain infringement of those rights in proceedings to which his assignor has not been made a party. The claim to a perpetual injunction in the present case was rested on the contention that in the circumstances the assignors could be no more than bare trustees of the performing rights for the appellants and had no present rights of their own, and I understand it to be admitted, that the same contention must be applicable to

any other case of a trust. This appears to be a complete innovation.

The recognition of an equitable title or a valid title in equity and the grant of relief to a person, so entitled, without joinder of the legal owner are distinct matters. The second is not necessarily involved in the first. The latter is essentially a matter of practice, and the established practice ought not to be disturbed, or at any rate only very sparingly. As it is certain that there is no practice to regard the joinder of the legal owner as generally unnecessary, it is for the appellants to show that it has been the practice to dispense with it in such cases as the present.

Their contention, I understand, in substance to be this. The present appeal relates not to debts but to property in the special form known as "copyright," and to an assignment, which is not by way of security but is absolute, though it is defeasible in the event of the dissolution of the association. There are old cases in which an equitable assignee, suing in equity for infringement of copyright without joining the legal owner, has obtained an interim injunction, and further has got the defendant put under terms not to dispute his title in the action at law brought to establish the alleged infringement. From this it is inferred that the Court of equity conceived itself to be competent to decide whether or not the circumstances necessitated the joinder of the legal owner, and did decide that, there being no substantial title outstanding to compete with the title of the equitable owner, no issue ought to be raised which would put the equitable owner to the trouble of joining another party. If so, it would follow as a matter of course that, when the equitable owner began an action at law and the Court of law, unaware of the absence of a legal title, decided in his favour that the infringement was proved, the equitable owner could come back to the Court of equity to get his perpetual injunction as of course, and it would not be worth while to oppose it. Hence it is that there has never been a report of such a thing, because it would never be matter in contest.

My Lords, my answer to this ingenious argument must be

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Lord Sumner.

with respect, that I think it is mere speculation, nor can I understand why it should be necessary now to go back to the decisions of Lord Eldon and Shadwell V.-C., since, if such a procedure was recognized, it ought to have been every day practice ever since equitable and legal jurisdiction became exercisable in the same Court fifty years ago. The absence of contest might explain the fact that no law reporter has reported the application for and the grant of the perpetual injunction in such cases, but in the first place a search of the records of Courts of equity would surely result in the discovery of many instances of such decrees, in suits in which the bill disclosed only an equitable title without joinder of the holder of the legal title, and in the second the practice books ought to state among other regular proceedings in such cases the application for and grant of the perpetual injunction to the equitable owner after the favourable termination of his proceedings at law. The search has, apparently, not been made, and the practice books are silent. A good many were referred to by counsel, but on examining them I think their tenor is wholly against the contention. Passages that might seem to support it do not really bear such a construction. I do not think we are called upon to go further for the purpose of discovering some ground for departing from the settled practice of joining the legal owner with the equitable owner in such cases.

It was indeed suggested by the appellants that the passage at the end of the opinion of Lord Macnaghten in *Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1) supported and indeed decided the point in issue in their favour, on the ground that the same objection was taken then as is taken by the respondents here, and that your Lordships' House refused to give effect to it. The question is whether it was really the same objection, for certainly the House did not give effect to it. The subject of the dispute was the right to be paid a debt which was due to the assignor till it was by him equitably assigned to the appellants. There was accordingly a possibility of the debtors being exposed to duplicate

(1) [1905] A. C. 454, 462.

claims. Lord Macnaghten accepts the rule, for which the respondents now contend, that the assignor ought to be made a party in order that he might be bound, but points out that *Brandt's Case* (1) was an exception to it. Plainly the House did not consider itself to be departing from established rules of practice, nor has the case ever been so regarded. It has, therefore, now to be shown that the present case is within the principle of the exception to which effect was then given. If the assignor, Kramrisch, was not made a party, he would not be bound; was it not possible that the debtors, the Dunlop Company, might be exposed to claims by him or his trustee in bankruptcy? Kramrisch, however, had already been settled with and the Dunlop Company held his receipt. It appears on reference to the arguments in the Courts below (2) that this fact was relied on. Kramrisch was therefore bound already. The respondents admitted that what they wanted was not the presence but the absence of the assignor, and that they did not propose to pay the assignor but desired to pay nobody, and this mere non-joinder of parties was not allowed to relieve them. *Brandt's Case* (1) is thus distinguishable, for the present case is otherwise. In the absence of the publishers, the assignors, the respondents here have no means of excluding the possibility that some assignment, other than the assignment to the appellants, might rank before it, and in such event they would have no answer to proceedings taken by such an assignee. If the publishers had been joined they might have been interrogated on the subject. In the absence of the publishers the respondents are not even protected against proceedings by the publishers themselves brought on some future occasion. They are entitled to have them joined now, so that they may be bound for the future. It is true that no suggestion is made that the publishers either contemplate such proceedings or have already created any title or any claims of title to sue in any assignees but the appellants. It is true that their position in their trade is unexceptionable

(1) [1905] A. C. 454, 462.
(2) (1903) 8 Com. Cas. 174, 177; [1904] 1 K. B. 387, 391.

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Lord Sumner.

and so well known that your Lordships might almost be invited to take judicial notice of it, but it is the right of the respondents that they should be protected; they are not required to be satisfied with the respectability of the assignors, however well known. They are not in possession of any such shield as protected the Dunlop Company, and there is nothing here to deprive them of the benefit of a rule which is of general application and does not depend on the particular character of the assignors in a given case. I, therefore, think that *Brandt's Case* (1) is not in point on the present occasion, for the respondents are not asking here, as the Dunlop Company asked, that a claim, otherwise undefended, should be defeated for mere non-joinder of parties. In my opinion the appeal fails.

LORD PHILLIMORE. My Lords, the title of the plaintiff society to sue depends upon instruments which purport to assign to the society rights in publications not already in existence or even in contemplation at the date of the assignment. Such assignments do not pass rights of property, as has been stated in more than one case, notably by Sir George Jessel M.R., in *Collyer* v. *Isaacs.* (2)

But the instruments amount to agreements to assign, and something more, so much more that if the doctrine laid down in *In re Clarke* (3) and *In re Lind* (4) be sound, the property has relatively between assignor and assignee passed, so that the assignee is in equity the real owner with the assignor as his trustee.

This, however, means that in relation to all other persons the assignee is still not the owner and cannot exercise the rights of owner or maintain an action against a trespasser or a pirate for an infringement of his supposed rights.

It is contended however, by counsel for the appellants that there is an exception to this rule in cases where copyright, and possibly also patent rights, have been pirated; and this contention is founded upon certain decisions long anterior

(1) [1905] A. C. 454.
(2) (1881) 19 Ch. D. 342, 352.
(3) 36 Ch. D. 348.
(4) [1915] 2 Ch. 345.

to the present Copyright Act and indeed earlier than the Judicature Acts and the fusion of law and equity.

These cases are somewhat difficult to deal with, and I have (as I imagine all your Lordships have) spent much trouble and time upon them; but I think they can be brought into line with the general principle which I have already stated.

The old Court of Chancery had three heads of jurisdiction. It enforced equitable rights as between cestui que trust and trustee or any person in a fiduciary relation analogous to that of a trustee. It assisted legal owners of property, giving remedies in addition to those which they would get at law, such as interlocutory orders to prevent mischief, and perpetual injunctions to prevent continuance of trespass. It also in aid of actions at law entertained suits for discovery and for perpetuation of testimony. Further, where the title to land was in question, and both disputants claimed under a predecessor who had mortgaged the property so that the legal estate was in the mortgagee, and the right of the disputants was only to an equitable estate, the Court, in order that the action might be fairly tried at law, forbade the defendant to rely as against the plaintiff upon the latter's defect in not having the legal estate.

I dwell upon this last head, because I think that it was in a supposed analogy that some orders in the cases under discussion were made.

Now here there is no question of equitable rights; and if the second head, that of equitable remedies, be confined to cases where the legal owner is suing, there would be no question of equitable remedies. But it is urged that in cases of copyright, possibly also of patents, the Court of Chancery gave an equitable remedy to persons who were not legal owners. I confess, my Lords, that I am most reluctant to suppose that the great masters of equity procedure were so illogical.

The most authoritative and the most difficult case is that of *Mawman* v. *Tegg* (1), decided by Lord Eldon in 1826. I think there is an earlier case which helps to explain it,

(1) 2 Russ. 385.

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Lord Phillimore.

that of the *Universities of Oxford and Cambridge* v. *Richardson* (1), decided in 1802. In that case Lord Eldon comments upon a statement by Lord Mansfield, that if the title was not clear at law, the Court of Chancery would not grant or sustain an injunction till it was made clear at law. Lord Eldon observes that "possession under colour of title is ground enough to enjoin, and to continue the injunction, until it shall be proved at law, that it is only colour and not real title."

Now in *Mawman* v. *Tegg* (2) counsel for the plaintiffs, who had long been and still were in possession of the work which was alleged to have been pirated, relied upon possession and upon the right of a possessor, recognized in all systems of jurisprudence with which I am acquainted, to maintain legal proceedings against a mere trespasser, at any rate until it is demonstrated that the possessor is not the true owner; and the Lord Chancellor thought that the title was sufficiently proved for the motion for an injunction; and he thought without deciding whether or not the plaintiffs had a good legal title (and there was much to be said for the affirmative) that they had at any rate a good equitable title. So Story, in his work on Equity Jurisprudence (1892 ed.), or the English editor—it may be the latter—says that it is sufficient for the plaintiff in these cases to have a clear equitable title (s. 935); and he adds: "Formerly indeed Courts of equity would not interfere by way of injunction to protect copyrights any more than patent rights, until the title had been established by law. But the present course is to exercise jurisdiction in all cases where there is a clear colour of title founded upon a long possession and assertion of right and a fair prima facie case of infringement is made out."

After *Mawman* v. *Tegg* (2) came a group of cases decided by Shadwell V.-C.: *Sweet* v. *Shaw* (3), decided in 1839; *Colburn* v. *Duncombe* (4), decided in 1838; *Sweet* v. *Cater* (5), decided in 1841; *Bohn* v. *Bogue* (6), decided in 1846; and

(1) 6 Ves. 689, 707.
(2) 2 Russ. 385.
(3) 3 Jur. 217; 8 L. J. (Ch.) 216.
(4) 9 Sim. 151.
(5) 11 Sim. 572.
(6) 10 Jur. 420.

besides these the case before the Irish Master of the Rolls in 1840: *Hodges* v. *Welsh*. (1)

In all these cases except *Colburn* v. *Duncombe* (2) it was considered that, for the purpose of an interlocutory order in the nature of an injunction and for the purpose of directing a trial at law, it was enough for the plaintiff to show that he had a good equitable title. But on the other hand, in *Colburn* v. *Duncombe* (2) the suit was held to be defective, and the bill demurrable, because the legal owner of the copyright was not a party; and upon reflection I come to the conclusion that all these cases come to is that for the purpose of an interlocutory order to restrain irreparable mischief, the Court would not inquire too nicely into the legal title of the bona fide possessor, who had always to undertake in damages if he failed in the end to maintain his suit.

I should add that in *Mawman* v. *Tegg* (3) it would seem to be the case that the plaintiff had a legal title to at least one-third of the copyright; that in *Bohn* v. *Bogue* (4) the Vice-Chancellor seems to have thought (and I should respectfully agree) that the plaintiff had a good legal title, though the point was not decided; and that in *Sweet* v. *Cater* (5) much could have been said for the argument that the plaintiff was the legal owner of a partial interest under the assignment made to him. If this be so, only *Sweet* v. *Shaw* (6) and *Hodges* v. *Welsh* (1) would create a difficulty.

But a further point is made. Your Lordships' attention is called to the fact that in *Mawman* v. *Tegg* (3); *Sweet* v. *Shaw* (6); and *Sweet* v. *Cater* (5), an order was made that if the plaintiff proceeded to a trial at law, the defendant should admit the plaintiff's title to copyright in the work alleged to be pirated, so that the only question for the jury would be whether or not one work was a piracy of the other. Here, I think, some assistance can be derived from considering the procedure on what has been sometimes called an Ejectment

(1) 2 Ir. Eq. Rep. 266.
(2) 9 Sim. 151.
(3) 2 Russ. 385.
(4) 10 Jur. 420.
(5) 11 Sim. 572.
(6) 3 Jur. 217; 8 L. J. (Ch.) 216.

H. L. (E.) 1923

PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Lord Phillimore.

Bill, something coming under the third head of Chancery jurisdiction—namely, the putting the matter into fair shape for a trial of the real point which it was desired to submit to a judge and jury—the procedure which was used possibly for the last time in the famous *Tichborne Case*, and has been now rendered unnecessary by an express provision in the Judicature Act of 1873.

The Chancery judges did not feel themselves at liberty to determine the legal question of piracy or no piracy. Their jurisdiction was only ancillary to help a plaintiff who had a good case at law; and for this purpose they required the determination at law of the substantive point. But in the cases under consideration they did not think it necessary that the question of ownership should be left to the common law Courts. They thought it was a point that they could determine for themselves, and that if prima facie the plaintiffs came before the Court as bona fide possessors without themselves making statements which impeached their own title, they might let the cases go to trial at law and come back to them for a final decision, giving in each case to the plaintiff, if the merits were all with him, every opportunity of getting his tackle right.

In *Colburn* v. *Duncombe* (1) the plaintiff by his own statement showed that he had no legal title, and this was too much although he was a possessor, and his bill was demurred to; but he was given leave to amend and put himself straight if he could.

As a result of this, I fear, somewhat long disquisition, I come, my Lords, to the conclusion that if this case were to be looked at as if the modern Copyright Acts had not been passed, the plaintiff society would have failed.

But when all is said and done, the title of the plaintiff society in this suit depends not upon considerations of ancient law, but upon the language of the existing Copyright Act of 1911. By s. 31 of this Act no person is to be entitled to copyright or any similar right in any work—whether published or unpublished — otherwise than under and in accordance

(1) 9 Sim. 151.

with the provisions of this Act or any other statutory enactment for the time being in force. By s. 5, sub-s. 2, the owner of the copyright, that is, in this case, the publishers being the assignees of the authors, may assign the right either wholly or partially, and either generally or subject to limitations as to space or time, and may grant any interest in the right by licence; and no such assignment or grant shall be valid unless it is in writing signed by the owner or his agent. By sub-s. 3, under any partial assignment of copyright, the assignee becomes entitled to some right; and he in respect of that right and the assignor in respect of the rights not assigned, is severally to be treated in respect of his interest as the owner of the copyright. Each therefore may bring an action with respect to the infringement of his right.

How does the plaintiff society prove itself to be the owner of the copyright or the assignee under a partial assignment? The only instruments in writing on which it relies are the indentures entered into by the publishers before ever the songs were composed, and as shown in the early part of this judgment, these indentures, though they constitute important relations between the parties to them, passed no right in the properties as against the world in general. It was suggested that in respect of the equitable interests passed the indentures might be treated as partial assignments; but in my judgment, partial assignments do not mean incomplete assignments but assignments of part, as, for instance, of the performing rights only or of the rights outside Great Britain or for a term of years. And therefore, my Lords, I think that the plaintiff society fails, and that this appeal should be dismissed.

I have not thought it necessary to comment specially upon the case of *Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1), because for present purposes it has been sufficiently disposed of in the opinions of the noble and learned Lords who have preceded me, and because further it seems to me robbed of much weight by the fact that the objection in that case was withdrawn at the Bar of the House.

(1) [1905] A. C. 454.

H. L. (E.) 1923 — PERFORMING RIGHT SOCIETY, LD. v. LONDON THEATRE OF VARIETIES, LD.

Neither, on the other hand, have I made any comment upon the suggestion made for the respondents that the plaintiff society was debarred from suing in this case because it was a trade union. If I had to express myself on this point it would be difficult for me to do it in respectful language.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 5, 1923.

Solicitors for the appellants: *Syrett & Sons.*

Solicitors for the respondents: *Kenneth Brown, Baker, Baker, for Hall, Hawkins, Pimblott, Brydon & Chapman, Manchester.*

[HOUSE OF LORDS.]

H. L. (E.)* 1923 — *Nov.* 13.

EDELL AND ANOTHER . . . . . APPELLANTS;

AND

DULIEU AND ANOTHER . . . . . RESPONDENTS.

Landlord and Tenant—Agricultural Holding—Lease with Option to determine—Notice to quit—Length of Notice—Agriculture Act, 1920 (10 & 11 *Geo.* 5, *c.* 76), *ss.* 13, 28.

The Agriculture Act, 1920, s. 28, which renders a notice to quit a holding invalid if it purports to determine the tenancy before the expiration of twelve months from the end of the then current year of tenancy, applies not only to the case of a yearly tenancy but to all contracts of tenancy in which a notice to quit is required to determine the tenancy, including a lease for twenty-one years with an option to either party to determine it on six months' notice at the end of first seven or fourteen years of the term.

A notice to quit includes a notice to determine the tenancy.

Decision of the Court of Appeal [1923] 2 K. B. 247 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of the Divisional Court (2) on appeal from a judgment of a Master on a summons under Order XIV.

* *Present:* VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

(1) [1923] 2 K. B. 247. (2) [1923] 1 K. B. 533.

By a lease dated September 30, 1915, the appellants demised to the respondents a farm called Wood End Green Farm, Northolt, Middlesex, for a term of twenty-one years from September 29, 1915, determinable at the option of either party at the end of the first seven or fourteen years of the term on giving to the other six calendar months' notice in writing.

On February 15, 1922, the appellants gave notice to the respondents in accordance with the terms of the lease to deliver up possession of the demised premises on determination of the first seven years of the term—namely, on September 29, 1922.

The respondents objected to the notice on the ground that it did not comply with the requirements of s. 28 of the Agriculture Act, 1920.

Thereupon the appellants commenced an action against the respondents by specially indorsed writ claiming possession of the farm. The respondents obtained leave to defend the action and, by consent, the action was referred to a Master.

The Master held that the notice was invalid and gave judgment for the respondents. The Divisional Court (Bailhache and McCardie JJ.) held that the notice was good and ordered the judgment of the Master to be set aside and judgment to be entered for the appellants. The Court of Appeal (Lord Sterndale M.R., Warrington and Atkin L.JJ.) reversed the decision of the Divisional Court and restored the judgment of the Master.

Schiller K.C. (with him *Duckworth*) for the appellants. The question turns upon the construction of ss. 13 and 28 of the Agriculture Act, 1920. Sect. 13 provides that in the case of tenancies for two years or upwards a year's notice must be given to terminate the tenancy, but that section does not apply to any tenancy granted or agreed to be granted before the commencement of the Act. Sect. 28 repeals s. 22 of the Agricultural Holdings Act, 1908, which relates to the length of a notice to quit in the case of a tenancy from year

H. L. (E.) 1923 EDELL v. DULIEU.

to year, and substitutes for it a provision that notwithstanding any provision in a contract of tenancy to the contrary a notice to quit shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of the tenancy, the object being to deprive the parties of the power of contracting out of the statute; and the section applies to pre-existing tenancies, provided that the notice is given after the commencement of the Act. The real meaning of these two sections read together is that s. 13 was intended to deal with leaseholds and s. 28 with yearly tenancies, otherwise s. 13 is superfluous. The Legislature did not intend to interfere with any existing rights at all. Accordingly in the case of s. 13, which deals with leaseholds, it is expressly provided that the section is not to apply to existing leases. The language of s. 28 is not clear enough to show that the Act was intended to have any retrospective operation, as it would do if this section is applied to a term of years.

Compston K.C. and *F. Hinde* for the respondents were not called upon.

VISCOUNT CAVE L.C. My Lords, in this case the facts are very short. On September 30, 1915, the appellants granted to the respondents a lease of a farm in Middlesex for a term of twenty-one years from September 29, 1915, determinable as mentioned in the lease. The lease was by its terms determinable, to put it shortly, by not less than six months' notice on either side, to expire at the end of the first seven or fourteen years. Such a notice was given by the appellants, the lessors, on February 15, 1922, and that notice purported to determine the lease "at the end of the first seven years thereof"—that is to say, at Michaelmas, 1922. The appellants contended that that notice was invalid in consequence of the provisions of s. 28 of the Agriculture Act, 1920, and thereupon this action was brought to recover possession. Master Jelf, to whom the matter was referred, decided in favour of the tenants; on appeal from him the Divisional Court decided in favour of the landlords; and on

appeal to the Court of Appeal that decision was reversed and judgment was given in favour of the tenants. Thereupon the present appeal was brought.

My Lords, s. 28, sub-s. 1, of the Agriculture Act, 1920, is in these terms : " Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy . . . . " and sub-s. 3 provides : " This section shall not apply to . . . . (*e*) any notice given before the commencement of this Act." Now prima facie this case falls exactly within the words of that section. This lease is a " contract of tenancy," because a contract of tenancy is defined by the Act of 1908 (with which this statute is to be read) as meaning " a letting of or agreement for letting land for a term of years, or for lives, or for lives and years, or from year to year." Again, this is a " notice to quit," because the terms of s. 28 show that a notice to quit includes a notice purporting to terminate the tenancy. Thirdly, this was the " then current year of tenancy," for it was that year of the twenty-one years which was current or running at the time when the notice was given. Therefore, prima facie, as I say, the section seems to cover the case.

But it is said that s. 28 applies only to yearly tenancies, and that argument is founded partly, at all events, on the history of this legislation. It is pointed out with perfect truth that the earlier enactments dealing with this particular subject matter—namely, the length of a notice to quit—had been confined to yearly tenancies. The last of these enactments was the Act of 1908, by s. 22 of which a twelve months' notice to quit was required in the case of a yearly tenancy. This Act of 1920 repeals s. 22 of the Act of 1908 and puts in its place the enactment which I have read ; and it is said that, as the repealed enactment was confined to yearly tenancies, this section must also be so confined. My Lords, I think that the argument tells the other way. The repealed enactment was in terms confined to yearly tenancies ; but in the new enactment the reference to yearly tenancies is

H. L. (E.) 1923 EDELL v. DULIEU. Viscount Cave L.C.

omitted, and you have in its stead the wide expression "a contract of tenancy." I think, therefore, that that argument breaks down.

Then it is said that another section in the same statute, s. 13, deals with tenancies for two years and upwards, that that section is confined to leases granted after the commencement of the Act, and accordingly that s. 28 must be read as not applying to an existing lease for a term of years. My Lords, I can see no inconsistency between the two sections; they seem to me to deal with different subject matters, or at all events to have different objects. The purpose and effect of s. 13 is that no future lease shall come to an end unless at least a year before the expiration of the term a notice to quit is given—I am only giving a rough paraphrase of the section. That applies to all future leases, including leases which do not contain any power to determine the tenancy by notice. On the other hand, s. 28 seems to apply only to cases where notice to quit is required, and among these cases would be both a tenancy from year to year and a tenancy for a term of years determinable by a notice to quit. It appears to me that the intention of s. 28 is that in all cases where a notice to quit the holding is required that notice shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the year of tenancy which is current when the notice is given.

My Lords, I have listened attentively to the arguments of the appellants in this case, but I am afraid that the wording of the statute is too strong for them. I agree with the construction put upon it in the Court of Appeal, and accordingly I move your Lordships that the appeal be dismissed with costs.

LORD DUNEDIN. My Lords, I am of the same opinion. If it could have been shown that, upon a certain construction of s. 28, s. 13 was mere surplusage, then I think there might have been some ground for the argument that s. 28 must be construed not according to what would be the prima facie view of its terms, but in a limited sense. But the true purport

of s. 13 was, I think, expounded by my noble and learned friend the Lord Chancellor, and I cannot therefore resist the generality of the words in s. 28. H. L. (E.) 1923 EDELL v. DULIEU.

LORD ATKINSON. My Lords, I concur.

LORD SUMNER. My Lords, I concur.

LORD BUCKMASTER. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 13, 1923.

Solicitors for the appellants: *Edell & Co.*
Solicitors for the respondents: *Ellis & Fairbairn.*

[HOUSE OF LORDS.]

ERNEST BECK AND COMPANY . . . APPELLANTS; AND K. SZYMANOWSKI AND COMPANY . RESPONDENTS. H. L. (E.)* 1923 Nov. 5.

Sale of Goods—Contract—Breach—Reels of Cotton—Short Measure—Contract Note—Conditions—Construction.

A contract note for the sale of 2000 gross of "200 yards reels" of sewing cotton contained the following condition: "The goods delivered shall be deemed to be in all respects in accordance with the contract and the buyers shall be bound to accept and pay for the same accordingly unless the sellers shall within fourteen days after the arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract." Eighteen months after delivery the buyers discovered for the first time that the length of cotton per reel was less than 200 yards, the average shortage being about 6 per cent., and they brought an action against the sellers for damages for breach of contract. The sellers pleaded that the condition was a bar to the action:—

Held, by Lord Atkinson, Lord Shaw of Dunfermline, and Lord

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD WRENBURY.

H. L. (E.)
1923
BECK & Co. v. SZYMANOWSKI & Co.

Wrenbury, Lord Buckmaster dissenting, that the condition applied to quality only and not to quantity, and that the buyers were entitled to judgment.

Per Lord Wrenbury. Assuming that the condition extended to quantity, while the condition excluded the right to reject, it did not extend to the right to claim damages.

Decision of the Court of Appeal [1923] 1 K. B. 457 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Lord Hewart C.J.

By a letter dated January 23, 1920, written by the respondents to the appellants, the respondents gave an order to the appellants for 2000 gross "of six-cord sewing thread" in lots of 400, 800, and 800 gross at the several prices therein mentioned; and the letter proceeded: "Length 200 yards —on reels. . . . . With tickets. The prices to include delivery f.o.b. English port. . . . ." The appellants replied on the same day: "We beg to hand you herewith official contract No. 186 for 2000 gross sewing cottons placed with us to-day and trust you will find same in order. . . . ." Enclosed in the letter was a contract note of the same date whereby the appellants sold to the respondents 2000 gross of "200 yards reels" of six-cord sewing cotton f.o.b. English port, subject to the general conditions at the back.

The contract contained the following among other general conditions:—

"(4.) The sellers only bind themselves to deliver goods in accordance with the general descriptions under which they are sold and they do not guarantee their suitability for any special purpose.

"(5.) The goods delivered shall be deemed to be in all respects in accordance with the contract and the buyers shall be bound to accept and pay for the same accordingly unless the sellers shall within 14 days after the arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract."

On February 5, 1920, the appellants sold to the respondents

(1) [1923] 1 K. B. 457.

a further 3000 gross of 200-yard reels upon the same terms and subject to the same conditions. Subsequently by agreement between the parties the term of the contract as to delivery was varied and the goods were delivered at certain warehouses in Manchester. The last delivery took place in May, 1920. The reels as received from the appellants were packed in cases each containing twenty gross. Each reel had a label pasted on the end of it bearing the words "200 yards." The respondents allowed the goods to remain in the warehouses until May, 1921, when they shipped 186 gross to customers in Russia. In October, 1921, they received complaints from their customers that the reels delivered to them were defective in that they contained thread of lengths less than 200 yards. The bulk of the goods, which still remained in the warehouses, was then examined by the Manchester Chamber of Commerce Testing House, when it was established that the average length of thread per reel was 188 yards. The respondents thereupon brought this action against the appellants for damages for breach of contract. The appellants relied on condition 5 as a defence to the action. The Lord Chief Justice held that the effect of the condition was to deprive the respondents of all their remedies, and dismissed the action.

The Court of Appeal (Bankes, Warrington and Scrutton L.JJ.) held that, while the condition deprived the buyers of their right to reject the goods or to claim a diminution of the price, it left untouched their right to claim damages for breach of contract. They therefore allowed the appeal and gave judgment in favour of the respondents.

1923. July 2, 3. *Merriman K.C.* and *Sir Harold Smith K.C.* for the appellants. Condition 5 in the contract of sale ousts not only the buyers' right to reject, but also his right to damages. No doubt it requires very clear language in a contract to negative a right to damages for the breach of it, but the words of the condition are clear and unambiguous. The Court of Appeal were not right in saying that the buyers must accept and pay for the goods as being in conformity

H. L. (E.) 1923 BECK & Co. v. SZYMANOWSKI & Co.

with the contract, but may claim damages on the footing that the goods are not in conformity with the contract. It may be further objected that the time has not begun to run because the goods never reached their original destination, the destination having been changed to the warehouses to which the goods were delivered, but both the Courts below have agreed that the goods reached their destination when they were put into the warehouses.

Cyril Atkinson K.C. and *Lustgarten* for the respondents. Upon the true construction of condition 5 it deals only with the right to reject and does not affect the buyers' right of action. Where, as here, the goods are not of the contract description, not being "200 yards reels," the condition does not apply at all, since the effect of its application would be to defeat the main object and intention of the contract. Assuming that the condition is capable of bearing the meaning sought to be put upon it by the appellants, it is a condition designed to exclude the ordinary rights which would follow in law from a breach of the contract and must be expressed in clear terms, whereas it is ambiguous and confusing. [They referred to *Wallis, Son & Wells* v. *Pratt & Haynes* (1) and *Glynn* v. *Margetson & Co.* (2)] The goods have not yet arrived at their destination within the meaning of the condition.

Merriman K.C. replied.

The House took time for consideration.

1923. Nov. 5. LORD BUCKMASTER (read by LORD ATKINSON). My Lords, in January, 1920, the appellants sold to the respondents 2000 gross of six-cord sewing thread of a certain defined character and at agreed prices, upon these elements of the transaction no question arises in this appeal. The terms of the contract material for the present purpose are contained in a written document dated January 23, 1920. It takes the form of a sold note, sent to the appellants, and

(1) [1910] 2 K. B. 1003, 1016; [1911] A. C. 394.
(2) [1893] A. C. 351.

states that the sale is subject to the general conditions at the back of the contract. The description of the goods is that of "six-cord sewing cotton 200 yards reel"; place of delivery is f.o.b. an English port. Clauses 3, 4 and 5 of the contract as contained in the general conditions, were as follows:—

"3. Should any deliveries under this Contract be suspended under the last preceding clause the buyers shall nevertheless accept delivery and pay for such of the goods as the sellers shall be able to deliver.

"4. The sellers only bind themselves to deliver goods in accordance with the general descriptions under which they are sold and they do not guarantee their suitability for any special purpose.

"5. The goods delivered shall be *deemed to be in all respects in accordance* with the Contract and the buyers shall be bound to accept and pay for the same accordingly unless the sellers shall within 14 days after arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the Contract."

By a subsequent arrangement, it was agreed that the appellants should deliver the goods to warehouses in England specified by the respondents instead of f.o.b. an English port. The goods, so far as quantity of reels and quality were concerned, were so delivered, the last delivery being made in May of 1920. The reels did not, however, contain the stipulated length of cotton but were short by an amount of, roughly speaking, 6 per cent.

In October, 1921, for the first time, the respondents made a complaint to this effect, and, as the appellants refused to recognize liability, the proceedings under which this appeal has arisen were instituted claiming damages for short delivery. The Lord Chief Justice, before whom the case was first heard, decided that the appellants were protected by virtue of cl. 5, and that judgment has been reversed by the unanimous opinion of the Court of Appeal. Two questions arise upon this clause. The first as to whether it applies at all in the circumstances of the case,

H. L. (E.) 1923

BECK & Co. v. SZYMANOWSKI & Co.

Lord Buckmaster.

and the other whether the goods had in fact reached their destination in October, 1921, when the complaint was made. The latter point may be disposed of first. I entertain no doubt that in the circumstances of this case the destination of the goods for the purposes of the contract was the substituted place of delivery—namely, the warehouses specified by the respondents. The sole question, and it is one of some difficulty, is whether the general provisions of the clause apply to the particular breach? I agree with what was said by Scrutton L.J., that in a contract from which the ordinary rights of buyer and seller ensue an attempt to exclude either party from those rights by general terms applicable to all contracts can only be effected by the use of plain language. But I cannot avoid the conclusion that the language in cl. 5 is substantially clear for the present purpose. The difference between myself and the Court of Appeal as well as the other members of your Lordships' House, from whom I am reluctant to differ, is that I think the difficulty is not so much due to the meaning of the words in cl. 5 as to the subject matter upon which they operate. Scrutton L.J. regards the contract as one which concerns a shortage of cotton on the reels. He suggests that the delivery is as different from the material contracted to be sold as peas from beans. I find myself unable to see why this distinction should be effected by a mere shortage in length and not also by a defect in quality. But a defect in quality in goods sold, though in one sense it renders them different from the goods contracted to be sold, does not make them into something outside the contract altogether. The peas would still be peas though they were of inferior quality, and would not become beans because the measure by which they were sold was deficient in capacity. The real question arises upon the meaning of the official description of the articles in the contract note. If it be regarded merely as a contract for the sale of a total length of cotton then that cotton has not been delivered, and the contract is no more satisfied than it would have been had there not been delivery of the total number of reels. But I regard

the contract as a contract for the sale of reels of cotton, each reel to contain cotton of a certain quality and of a certain length, and failure to make complaint within the fourteen days in my opinion accepts the reels so delivered as satisfying the condition the contract imposes.

It is urged that cl. 5 merely relates to the actual acceptance of the goods, but its introductory words appear to me to go further than that. The words, "the goods delivered shall be deemed to be in all respects in accordance with the contract," have a wider and more far-reaching significance than mere conditions as to acceptance; there ensues the consideration that the goods may not be in accordance with the contract, but they must, none the less, be taken as though they were unless complaint be made within fourteen days. A reel, containing 185 yards, is not in accordance with the contract, but it is none the less in my opinion a delivery of goods under the contract, and not as in the case of the delivery of a totally different article, the delivery of goods outside.

I think, therefore, that the appellants are right in saying that in the circumstances the respondents have no claim against them. It is with more than usual hesitation and regret that I find this view opposed to that of other learned judges of such great experience in commercial matters as those who differ from me in this opinion; but the difference is, no doubt, due to the different meanings conveyed to different minds by a phrase such as that on which this controversy depends, and I find myself unable to give it any other meaning than that which I have attempted to explain.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the judgment that has been prepared by my noble and learned friend, Lord Wrenbury. I thoroughly concur in it, and in accordance with it I beg to move, my Lords, that the appeal be dismissed and the order appealed from be affirmed.

LORD SHAW OF DUNFERMLINE. My Lords, my opinion on this case can be expressed in a few sentences.

I think that this was a transaction in the cotton trade and that this was a contract for the sale of cotton thread.

BIBL. LONDIN. UNIV.

H. L. (E.) 1923

BECK & Co. v. SZYMANOWSKI & Co.

Lord Shaw of Dunfermline.

The make up of the thread was agreed to be in lengths of 200 yards, wound on reels.

The number of reels delivered was correct, but it is admitted that large quantities of the reels delivered contained lengths not of 200 yards but of about 188 yards. The average shortage was 6 per cent., amounting to millions of yards of cotton thread.

Payment of damages for short delivery is refused by the sellers, because, particularly, of cl. 5 of the printed conditions incorporated into the contract. I note the terms of that clause again only that I may indicate the exact words which, in my humble opinion, make the clause inapplicable as a bar to the present claim. The clause applies to "the goods delivered," saying that they shall be deemed to be in all respects according to contract.

But one may stop there; for the damages are claimed not in respect of the goods delivered but in respect of goods which were not delivered. And when fourteen days are given for notice of any "matter or thing of reason whereof they may allege that the goods are not in accordance with the contract" the expression "the goods" can only mean "the goods delivered," to which alone the clause applies.

Anything else would mean that the sale was in substance a sale of reels and was not in substance a sale of cotton thread. I think this is to confound make up with substance. And the results would be extraordinary; if a seller innocently sent forward the number of reels with only half the thread that should be upon them, the clause would cover that portion, and the seller would, barring objection within fourteen days, keep the price for the whole thread, although he had only supplied half. Learned counsel admitted this. Prima facie, such a construction seems unreasonable.

The contract itself does not, it is granted, expressly provide for the case of short delivery. It can, however, and very properly, apply with regard to actual deliveries and to objections to these on the points, say, of quality, colour, weight or tensile strength.

But in my opinion the clause can never be used so as to convert goods undelivered into goods delivered or to warrant an implication to the effect that non-delivery in length or small measure was included in the objections which should, within the time fixed, be made to goods delivered. I am totally unable to make such an implication out of anything in the bargain between these parties—an implication which would seriously affect the security of business dealings.

I think that the appeal should be dismissed, with costs.

LORD WRENBURY. My Lords, the letter of January 23 on p. 65 is an offer to buy. It contains the words "With tickets." The letter of the same date on p. 66, and the official contract, No. 186, enclosed in it, is an acceptance by the vendor on the terms of the official contract. That official contract does not contain the words "With tickets." The reels were supplied with tickets bearing the words "200 yards," but in the facts above stated there was no stipulation in the contract that there should be a label, and therefore of course no stipulation that, by reason of the label, the reels should be deemed to contain 200 yards, whether they did or not.

The offer was to buy 2000 gross "Six-cord Sewing Thread —Length 200 yards—on reels." The official contract was to sell that number of gross "Six-cord Sewing Cotton—200 yards reels." This was, I think, a contract to sell and buy a certain yardage of cotton to be put up on reels, each of which was to contain 200 yards. In fact the yardage which would result from 2000 gross of reels each containing 200 yards was not supplied. There was a shortage of about twelve yards, or 6 per cent. per reel. The question is what under these circumstances is the effect of No. 5 of the general conditions in the contract?

The whole question is, to my mind, governed by the words "The goods delivered" in that condition. For simplicity and clearness of statement let me assume that the contract was confined to one reel and was for 200 yards of cotton—on reel. The "goods delivered" were 188 yards of cotton on a reel.

H. L. (E.) 1923

BECK & Co. v. SZYMANOWSKI & Co.

Lord Wrenbury.

Condition 5 will then read "188 yards of cotton on a reel shall be deemed to be in all respects in accordance with the contract." These words do not convey that 188 yards shall be deemed to be 200 yards, but at most that the buyer is to be bound to admit that the goods delivered—the 188 yards sent him are such thread as he ordered, and that he is not to be heard to complain that the stipulation to wind 200 yards on a reel has not been complied with. This does not go at all to shortage of cotton. I say "at most" because I do not intend by anything I say to prejudice any question which may be thought material on the question of damages. By way of illustration of the above proposition, suppose the contract were to deliver 100 tons of goods, and that only ninety-six tons were delivered, a condition such as condition 5 would not compel the buyer to admit that he had received 100 tons but only that the "goods delivered"—namely, ninety-six tons—were in all respects in accordance with the contract. The proposition may be compendiously stated by saying that the condition applies to quality not to quantity. The contractual quantity has not been mentioned or referred to in the condition. The only mention of or reference to quantity to be found in the condition lies in the words "the goods delivered," and they ex hypothesi are less than the contractual quantity. The condition does not provide that the deficient quantity shall be deemed to be the contractual quantity.

Further, if the condition did extend, as I think it does not, to quantity, I agree with the Court of Appeal, that while the condition excludes the right to reject, it does not extend to the right to claim damages. The appeal must, I think, be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 5, 1923.

Solicitors for the appellants: *Dehn & Lauderdale.*

Solicitors for the respondents: *Pritchard, Englefield & Co., for Boote, Edgar & Rylands, Manchester.*

[HOUSE OF LORDS.]

DRUGHORN . . . . . APPELLANT; H. L. (E.)* 1923 Nov. 8.

AND

MOORE AND OTHERS . . . . . RESPONDENTS.

Income Tax—Landlord's Property Tax—Landlord and Tenant—Undertaking of Tenant to put Premises in Repair in Substitution for First Year's Rent —Tax paid while Premises held Rent Free—Tenant's Right of Recoupment —"Entitled to deduct in respect of the rent payable"—Income Tax Act, 1918 (8 *& 9 Geo.* 5, *c.* 40), *Sch. A, No. VIII., r.* 1.

By the Income Tax Act, 1918, Sch. A, No. VIII., r. 1 (which relates to property tax): "A tenant occupier of any lands, tenements, hereditaments or heritages who pays the tax shall be entitled to deduct and retain in respect of the rent payable to the landlord for the time being . . . . an amount representing the rate or rates of tax in force during the period through which the said rent was accruing due for every twenty shillings thereof, the said deduction to be made out of the first payment thereafter made on account of rent."

In the course of negotiations for the granting of a lease of some stables for a term of years at a certain annual rent it was agreed between the parties that, instead of the landlord putting the premises in repair, the tenant should undertake to do the repairs "in consideration of no rent being payable for the first year of the term." Accordingly a lease was executed reserving a peppercorn rent for the first year and the agreed money rent for the residue of the term, and, on entering, the tenant executed the repairs. The tenant paid the property tax payable in respect of the premises for the first year and claimed to deduct it from the money rent payable to the landlord for the second year, upon the ground that the expenditure on the repairs was to be treated as the equivalent of the rent for the first year of the term within the meaning of r. 1.

In an action by the landlord for rent:—

Held, that the expenditure on repairs was not to be treated as rent, but was to be accepted as the substitute for an agreement to pay rent, and that the tenant was not entitled either to deduct the tax payable during the first year of the tenancy or to counterclaim for the amount of the tax as money paid for the use of the landlord.

Decision of the Court of Appeal [1922] 2 K. B. 492 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Lush J.

The facts are fully stated in the report of the case before

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SUMNER, and LORD PARMOOR.

(1) [1922] 2 K. B. 492.

H. L. (E.) 1923

DRUGHORN v. MOORE.

the Court of Appeal and in the judgment of the Lord Chancellor, and are summarized in the headnote.

The substantial question for determination was whether a tenant who under an agreement with his landlord had put the demised premises in repair at his own expense in consideration of no rent being payable for the first year of the term, and had by the terms of the lease held the premises rent free for the first year of his occupation, was entitled under Sch. A of the Income Tax Act, 1918, to deduct from the rent payable by him during the second year the property tax paid by him in respect of the premises during the first year, on the ground that the expenditure on the repairs was equivalent to the payment of rent. Lush J. decided this question in favour of the appellant, the tenant, but the Court of Appeal (Bankes, Warrington and Atkin L.JJ.) reversed his decision.

Compston K.C. and *Trapnell* (with them *Fachiri*) for the appellant. The intention of the parties was to treat the expenditure on the repairs as the equivalent of the rent for the first year of the term. It was an expenditure which enured for the benefit of the respondents in relief of an obligation which would otherwise have fallen on them, and was, in substance, if not in form, a payment of rent. The nominal consideration, the peppercorn rent, does not prevent the real consideration from being proved : *In re British and Foreign Cork Co.* (1) On the terms of the lease there is an implied covenant by the respondents, the landlords, by virtue of the exception of the property tax in the tenant's covenant, to pay rates and taxes. As between the respondents and the appellant the respondents agree to bear the property tax ; otherwise no effect is given to the exception : *Graham* v. *Tate.* (2) The appellant is entitled to deduct the sums paid by him in respect of the property tax for the first year from the payment of the rent, or, in the alternative, to counterclaim for these sums as money paid for and on behalf of the respondents at their request, inasmuch as they were paid

(1) (1865) L. R. 1 Eq. 231. (2) (1813) 1 M. & S. 609.

by him under compulsion of law and were sums which the respondents as the landlords were primarily liable to pay.

Maugham K.C. and *Foà* for the respondents were not called on.

VISCOUNT CAVE L.C. My Lords, this appeal involves a sum of about 20*l.*; but if a litigant thinks that he is aggrieved by a decision of the Court of Appeal to the extent even of 20*l.*, he has the right to come here and put his case before the House, of course at his own risk as to costs.

The appellant in this case took on January 15, 1919, a lease from the respondents or their predecessors in title of some stables in London for the term of fourteen years from December 25, 1918, at a rent for the first year of a peppercorn and for the remainder of the term of 85*l.* per annum. The lease contained a covenant by the tenant to put and keep the premises in repair at his own expense. That covenant was performed, and the premises were put in repair at a cost of something over 100*l.* During the year 1919, the first year of the lease, the tenant was assessed to property tax and paid that tax to a proportionate amount of something over 20*l.*; and when the rent payable for the first quarter of 1920 fell due, that is to say on Lady Day, 1920, he claimed to deduct from that quarter's rent the tax which he had paid in respect of the year 1919. The claim to deduct was made under the Income Tax Act, 1918, of which Sch. A, No. VIII., r. 1, provides that "A tenant occupier of any lands, tenements, hereditaments or heritages who pays the tax shall be entitled to deduct and retain in respect of the rent payable to the landlord for the time being (all sums allowed by the Commissioners being first deducted) an amount representing the rate or rates of tax in force during the period through which the said rent was accruing due for every twenty shillings thereof, the said deduction to be made out of the first payment thereafter made on account of rent," and so on.

Now it is not disputed by counsel for the appellant, who

H. L. (E.) 1923 DRUGHORN v. MOORE. Viscount Cave L.C

put their case in the best way in which it could be put, that if there was no rent payable in respect of the year 1919 the deduction claimed could not be made. That follows I think from the very words of the section—the words "in respect of the rent payable to the landlord for the time being," and the later words "an amount representing the rate or rates of tax in force during the period through which the said rent was accruing due for every twenty shillings thereof." But it was said that in fact in this case there was a rent, or an equivalent to rent, accruing and payable for the year 1919 during which the tax accrued due; and that contention was founded on some correspondence which preceded the grant of the lease, the effect of which appears in a letter of January 2, 1919, where it is shown that the proposal was that instead of the landlords carrying out any repairs (that is, putting the premises into repair) the tenant should "undertake to do what is required in consideration of no rent being payable for the first year of the term." That proposal was accepted, and found its way into the lease in the shape of the reservation of a peppercorn rent only for the first year and a covenant by the tenant to put the premises into repair. It is said that the result of that agreement was that in effect the tenant paid rent for the first year by setting off against that rent his expenditure on repairs. I do not think that that meaning can be given to the letter or to the agreement between the parties. The effect of the agreement was, not that the tenant should pay rent in the shape of a payment for repairs, but that he should do the repairs and pay no rent. I cannot accept the phrase of the learned trial judge where he says that "the substance of the agreement was that this money which the tenant was to spend was to be treated between the parties as rent." In my view that expenditure was not to be treated as rent but was to be accepted by the landlords as the substitute for an agreement to pay rent, and no rent was in fact paid to the landlords. In my view the claim to deduct wholly fails.

Then it is said that, if the deduction could not be made,

then the landlords were liable to repay the tax in question to the tenant on the ground that it was money paid for his use. That is based in the statement of claim upon the view that the landlords were primarily liable for the tax and the tenant had paid it for them. That of course is not the case. The tenant is primarily liable for the tax, and he has the right to deduct it in certain cases from the rent paid. Then it is said that in any case the lease itself contains a covenant which obliges the landlords to make this payment, and that is based upon a covenant in the lease by the tenant to pay rates and taxes, property tax only excepted. I do not think that the effect of those words is to fix the landlords with a covenant to pay; the only effect of them is to keep alive the right of the tenant to deduct the tax from the rent in the manner allowed by the statute.

My Lords, in my view the appeal wholly fails, and I move your Lordships that it be dismissed with costs.

VISCOUNT HALDANE. My Lords, I am of the same opinion. The jurisprudence of this country allows people a large latitude in bargaining about property, but they must understand that if they make contracts they must be judged as to their intentions by the words they have used and not by their intentions otherwise conceived. Here the parties made a bargain about what was to be done, and I agree with my noble and learned friend on the Woolsack that it is impossible, having regard to the language used, to say that the money paid for repairs was intended to be in the nature of rent. There was to be no rent, in consideration that the money was to be spent in repairs; and that is quite a different proposition.

Then there was a second point taken, that under the statute a right to deduct arose; but when you look at the terms of the statute really no such right arises, because the statute gives the right "in respect," and in respect only, "of the rent payable to the landlord" "to be made out of the first payment thereafter." The first payment of rent was a peppercorn in this case and therefore was not available, and there

H. L. (E.) 1923 DRUGHORN v. MOORE. Viscount Haldane.

is no other right given under the statute. Therefore the second point seems to me to be as unfortunate as the first point.

Then it is said that, even if that be not so, the appellant is entitled to recover under the counterclaim, because under the counterclaim there is what amounts to an agreement on the part of the landlords to bear this liability for the property tax, and there is cited in support of that decision Lord Ellenborough in *Graham* v. *Tate* (1); but when one looks closely at *Graham* v. *Tate* (1) the case proceeded upon this, that there was an express agreement by the landlord that he would pay the property tax, notwithstanding that it fell upon the tenant by way of assessment. Now here there is no such agreement, and I am unable for the reasons already given to pick any such agreement out of the documents. All that was said was that the landlord's property tax which is primarily payable by the tenant may be taken out of the first instalment of rent for the period in respect of which the tax was paid. As there was no rent there can be no taking out.

My Lords, on all these points the appeal fails.

LORD ATKINSON. My Lords, I concur. It is said that an Act of Parliament can do a great many things, but one of the things it cannot do is, to enable a man to deduct a certain sum from rent where he pays no rent. I quite concur with Bankes L.J. when he says you must take the terms of this deed and be bound by them. No rent is reserved, and therefore under the Income Tax Act there is nothing upon which any tax can be levied. I have no doubt that it is quite impossible to treat this sum, which was to be expended in repairs, as rent reserved by the lease. What occurred to my mind was simply this: that when it was arranged that the tenant should make the repairs the landlords said: "Well, as recompense to you we will give you the use of the property for twelve months without charging you anything for it." I think there is not any primary liability on the landlords

(1) 1 M. & S. 609.

to pay the tax, and therefore the claim for money paid to his use is unsustainable.

I think the appeal should therefore be dismissed.

LORD SUMNER. My Lords, I concur.

LORD PARMOOR. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 8, 1923

Solicitors for the appellant: *J. A. & H. E. Farnfield.*
Solicitors for the respondents: *Gibbon & Moore.*

[HOUSE OF LORDS.]

ST. HELENS COLLIERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

HEWITSON . . . . . RESPONDENT.

Workmen's Compensation—"Arising out of and in course of employment"—Accident to Workman returning from Work by specially provided Train—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman employed at a colliery was injured in a railway accident while travelling in a special colliers' train from his work to his home at M. By an agreement between the colliery company and the railway company the railway company agreed to provide special trains for the conveyance of the colliery company's workmen to and from the colliery and M., and the colliery company agreed to indemnify the railway company against claims by the workmen in respect of accident, injury or loss while using the trains. Any workman who desired to travel by these trains signed an agreement with the railway company releasing them from all claims in case of accident, and the colliery company then provided him with a pass and charged him a sum

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD CARSON.

H. L. (E.)
1923
ST. HELENS COLLIERY CO. v. HEWITSON.

representing less than the full amount of the agreed fare, and this sum was deducted week by week from his wages:—

Held (by Lord Buckmaster, Lord Atkinson, Lord Wrenbury and Lord Carson; Lord Shaw of Dunfermline dissenting), that, there being no obligation on the workman to use the train, the injury did not arise in the course of the employment within the meaning of the Workmen's Compensation Act, 1906.

Cremins v. *Guest, Keen & Nettlefolds* [1908] 1 K. B. 469 overruled.

Holmes v. *Great Northern Ry. Co.* [1900] 2 Q. B. 409 distinguished.

Dictum of Farwell L.J. in *Gane* v. *Norton Colliery Co.* [1909] 2 K. B. 539, 545 considered.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal affirming an award of the county court judge of Cumberland in an arbitration under the Workmen's Compensation Act, 1906.

The appellants were the owners of the St. Helens Colliery and the Siddick Colliery.

The respondent was engaged by the appellants in 1910 as a coal hewer, and on October 10, 1921, the date of the accident hereinafter mentioned, he was employed at the Siddick Colliery. He resided at Maryport, which was four miles from the St. Helens Colliery, and six miles from the Siddick Colliery. Under agreements dated November 20, 1882, August 9, 1907 (with two supplemental agreements dated November 12, 1918, and March 1, 1918), made between the appellants and the London and North Western Railway Company the railway company provided special trains for the conveyance of the appellants' workmen to and from their collieries and Maryport at a monthly charge to the appellants according to a scale dependent on the number of their workmen using the trains, and the appellants covenanted to indemnify the railway company against claims by their workmen in respect of accident, injury or loss while using the trains referred to in the said agreements. The railway company had also erected special colliers' platforms at a point between Siddick Junction and Flimby. These trains were run in connection with the shifts at the appellants' collieries. They were owned and worked by the railway company. Each workman intending to use these trains signed an indemnity form by which he agreed not to make

any claim against the railway company for damage or accidental injury while travelling by the specified trains.

After signing this form he received from the appellants a pass entitling him to travel by the trains referred to in the agreements, and the sum of 1*s.* 8*d.* per week was deducted by the appellants from his wages. The cost of an ordinary weekly workman's ticket from Maryport to Siddick was 3*s.* 9*d.*

The appellants' workmen were not paid for the time spent in travelling to and from their work. All the workmen did not travel by these trains. Some walked and some went by omnibus.

On October 10, 1921, the respondent, who had travelled from Maryport to the colliery by a train starting at 5.20 A.M., to join the morning shift, was travelling from his work to his home by one of the special trains, and in the course of this journey the engine fouled the points and was derailed, with the result that the carriage in which the respondent was travelling was overturned and he was injured. On this evidence the county court judge, under the heading "Findings of Fact," found as a fact, so far as it was a question of fact, "that it was an implied term of the contract of service that the trains should be provided by the employers and that the miners should have the right, if not the obligation, to travel to and fro." Under the heading "Findings of Law" he found, in so far as it was a question of law, that the contract of service impliedly included the time at which the accident occurred—"that is, the employment began when the man entered the train and ceased when he left it." He also thought that "it was obligatory on this man, who lived six miles away and who had to be—when on the day shift—at his work at 5.45 A.M., to use the train if he wished to continue in the employers' service." It was sufficient, however, if the man had the right to use the train. In his opinion the case was absolutely covered by *Cremins* v. *Guest, Keen & Nettlefolds.* (1) He accordingly made an award in the respondent's favour.

(1) [1908] 1 K. B. 469.

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

The Court of Appeal (Lord Sterndale M.R., Warrington and Younger L.JJ.), on the authority of the above case, affirmed the award of the county court judge.

1923. June 28; July 2. *Sir Leslie Scott K.C.* (with him *Holman Gregory K.C.* and *William Procter*) for the appellants. 1. Prima facie employment begins and ends at the employer's premises in a case where the employment is on fixed premises, such as a mine or factory. 2. In determining whether there is an extension of the employment beyond the ambit of the premises the test is whether the workman is in the place where he is at the time of the accident pursuant to a duty imposed by the contract of service; if he is, the accident arises in the course of the employment; otherwise not. In *Cremins* v. *Guest, Keen & Nettlefolds* (1) the Court of Appeal went wrong in not distinguishing between the right and the duty of the workman to travel to and from his work by train. It is essential that there should be an obligation so to travel. *Walton* v. *Tredegar Iron Co.* (2) follows *Cremins' Case* (1) and carries the matter no further. Employment means the work which the workman is employed to do with the incidents of that employment. It makes no difference that special trains are provided in pursuance of an agreement between the employer and the railway company, apart from the question of the obligation to travel. The advantages provided by the employer to the workman are not relevant to the question what the man was employed to do. The test is, was the workman employed to go on the train? Was this an obligation which the man was bound by the terms of his employment to perform or was it a privilege which it was in the option of the man to accept or decline? *Davidson & Co.* v. *M'Robb* (3) lays down the true principle. *Davies* v. *Rhymney Iron Co.* (4); *Nolan* v. *Porter & Sons* (5); *Philbin* v. *Hayes* (6); *Edwards* v. *Wingham Agricultural*

(1) [1908] 1 K. B. 469.
(2) (1913) 6 B. W. C. C. 592.
(3) [1918] A. C. 304.
(4) (1900) 16 Times L. R. 329.
(5) (1909) 2 B. W. C. C. 106.
(6) (1918) 87 L. J. (K. B.) 779.

Implements Co. (1); *Bell* v. *Armstrong, Whitworth & Co.* (2); illustrate this principle. In *Stewart & Son* v. *Longhurst* (3) the risks of the dock from which the man fell were incidents of his employment, because traversing the dock was absolutely necessary to the repairing of the barge which the man was employed to repair; he was therefore doing what he had got to do. *Armstrong, Whitworth & Co.* v. *Redford* (4) turned on the fact that the stairs on which the claimant slipped were part of the access to the work. The respondent in this case being under no obligation to travel by the train, the accident did not arise in the course of the employment.

Eastham K.C. and *Cremlyn* for the respondent. The test propounded by the appellants, that to satisfy the words "arising in the course of the employment" there must be an obligation or duty on the workman under his contract of service to do what he is doing at the time of the accident, is not well founded and is opposed to the decision of this House in *Armstrong, Whitworth & Co.* v. *Redford* (4), where the claimant met with an accident on returning from the canteen, to which she was invited, but was not obliged to go. That shows that the test of obligation is not the true test. There is nothing of the kind to be found in the words "arising out of and in the course of the employment." This train was a specially provided means of access. It was an incident of the employment that the men had to be conveyed from Maryport to the colliery. It is enough to say that travelling by this special train under the special conditions imposed was within the contemplation of both parties to the contract as reasonably incidental to it: per Lord Sumner in *Redford's Case.* (5) It was said there that the place of the accident was part of the employer's premises, but ownership or control by the employer of the spot where the accident occurred is not the test: per Viscount Finlay and Lord Dunedin in *Longhurst's Case.* (6) In *Thom* v. *Sinclair* (7) Lord Shaw states his view

(1) (1913) 6 B. W. C. C. 511.
(2) (1919) 12 B. W. C. C. 138.
(3) [1917] A. C. 249; [1916] 2 K. B. 803.
(4) [1920] A. C. 757.
(5) [1920] A. C. 777.
(6) [1917] A. C. 253, 256.
(7) [1917] A. C. 127, 142.

H. L. (E.) 1923 ST. HELENS COLLIERY CO. v. HEWITSON.

of the Act to be that the expression "arising out of the employment"—and his remarks must extend to "arising in the course of"—"applies to the employment as such—to its nature, its conditions, its obligations, and its incidents"; and if by reason of any of these the workman is injured he is entitled to compensation. If the incidents of the employment are included, one of the incidents of the employment in this particular case was the special contractual right of the workman to travel in the train provided by the employers if he so desired. He was not in this train by virtue of any contract of carriage between him and the railway company; his only contract was with the colliery company. This then was a provided means of access. If the workman is in a place in which his contract of service entitles him to be and that is in the contemplation of the parties he is in the course of his employment; no obligation is necessary. "In the course of the employment" means "in the course of the work which the man is employed to do, and what is incident to it—in other words, in the course of the service": per Viscount Finlay in *M'Robb's Case* (1); and, although he differed from the other members of the House on the facts of that case, his definition was accepted by the House. In *Longhurst's Case* (2) Viscount Finlay says: "It has been established by a series of decisions that employment for the purposes of the Workmen's Compensation Act may in many cases be regarded as existing before the actual operations of the workman have begun, and that it may continue to exist after the actual work has ceased," and he quotes Lord Halsbury's judgment in the unreported case of *Cross, Tetley & Co.* v. *Catterall*, where a man who was on his way to the colliery for the purpose of working was held to be in the course of his employment. So in *Gane* v. *Norton Hill Colliery* (3) Farwell L.J., in a passage which is quoted by Lord Atkinson in his judgment in *Lancashire and Yorkshire Ry. Co.* v. *Highley* (4), regards it as settled law that the word "employment" extends to all those things which the

(1) [1918] A. C. 314.
(2) [1917] A. C. 252.
(3) [1909] 2 K. B. 539, 545.
(4) [1917] A. C. 352, 371.

workman is entitled by virtue of his contract to do, and as illustrations of this principle he cites *Cremins* v. *Guest, Keen & Nettlefolds* (1) and *Holmes* v. *Great Northern Ry. Co.* (2) He then proceeds : "All those things that he" (the workman) "is entitled to do by virtue of his contract he is for the purposes of the Act employed to do, and they are therefore within his contract of employment." So here the right of the respondent to travel by this train arose by virtue of his contract of employment, and in exercising that right he was in the course of his employment.

[They also referred to *Cook* v. *S.S. Montreal* (3) and *William Baird & Co.* v. *M'Graw.* (4)]

Sir Leslie Scott K.C. replied.

The House took time for consideration.

1923. Nov. 22. LORD BUCKMASTER. My Lords, this appeal is brought by the St. Helens Colliery Company against a judgment of the Court of Appeal, who have decided that the respondent, a miner in the appellants' service, is entitled to compensation under the Workmen's Compensation Act, for injuries sustained by him when travelling in a train from his place of residence at Maryport to the colliery. Such a claim can, of course, only be maintained if the injury arose to the workman "in the course of and arising out of his employment." It is useless to lament the obscurity of these words, and wrong to inquire what was the intention behind the Act except so far as such intention is disclosed in the language of the statute construed in accordance with certain fixed and well-known principles. The facts of the case, according to my view, are these :—

The workman lived at Maryport, some five miles distant from the colliery. A number of other colliery workers were in like case, and the appellants, recognizing no doubt the importance of securing transport for their men to and from the pits, entered into a contract with the London and North

(1) [1908] 1 K. B. 469.
(2) [1900] 2 Q. B. 409.
(3) (1913) 6 B. W. C. C. 220, 223.
(4) (1920) 13 B. W. C. C. 233.

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

Lord Buckmaster.

Western Railway Company, by which the company agreed to provide special trains for the conveyance of the workmen to and from the colliery and Maryport. By this contract the appellants agreed to indemnify the railway company against claims for damages by the passengers in case of accident. The appellants then provided each workman with a pass upon the railway and charged for it a sum which did not represent the full amount of the agreed fare, and this sum was deducted week by week from their wages. On entering the employment of the colliery company, the workman who desired to avail himself of this means of transport signed an agreement with the railway company releasing them from all claims in case of accident. On October 10, 1921, the respondent, while travelling by virtue of the pass thus obtained as a workman, was injured through a railway accident. He has been deprived of his claims against the railway company; if he has no claim against his employers he is left wholly unprotected.

The learned county court judge has found that it was an implied term of the contract of service that the train should be provided by the employers. I entirely agree with that conclusion. It was as a workman entering the service of the employers that he obtained a pass enabling him to travel and released his rights against the railway company. It was, I think, an inseparable part of his contract of employment. It does not, however, seem to me that this conclusion determines the case in his favour. He had undoubtedly the right to travel by the train—the right enjoyed by him as a miner in the service of the appellants; but he was not directed to travel by such a train; had he found it convenient or desirable, he could have travelled by other means.

The real question to my mind is whether, when he entered the train in the morning, it was in the course of his employment within the meaning of the Act. I find it difficult to fix the test by which this question can be answered in favour of the respondent. In the case of *Cremins* v. *Guest, Keen & Nettlefolds* (1) the circumstances are, as the Court of Appeal

(1) [1908] 1 K. B. 469.

thought, indistinguishable from the present, and it is there stated that the phrase "in the course of his employment" is satisfied if the workman is in the place where the accident occurred by reason of an implied term of the contract of service that he should have the right, if not the obligation, to use the train. I find it difficult to accept this test. A man entitled by virtue of his contract of service to a holiday and a free ticket will equally be on his journey by virtue of the right obtained by his contract of service. But it seems to me difficult to say that an accident occurring to him in the train must be in the course of his employment. The workman was under no control in the present case, nor bound in any way either to use the train or, when he left, to obey directions; though he was where he was in consequence of his employment, I do not think it was in its course that the accident occurred.

The case of *Holmes* v. *Great Northern Ry. Co.* (1) is a different case, for there a railway man, working at King's Cross, was told to go to Hornsey, and a train was provided for him at King's Cross. A. L. Smith L.J. held that it was as a workman in the course of his employment that he entered the train at King's Cross; but I cannot see that those are the circumstances here.

The case of *John Stewart & Son, Ld.* v. *Longhurst* (2) does not really offer much assistance. There the access to the work was dangerous and was the only means by which the work could be approached or left. The man was bound by the terms of his employment to be where he was.

I think it would be wrong, having regard to the purpose of this statute, as disclosed both in its construction and in its history, to narrow the meaning of the words used; they are general words intended, as I regard them, for a wide and general application; but I find myself unable so to construe them as to include in their operation the right of travelling by a train which the workman was under no obligation and no proved necessity to use.

(1) [1900] 2 Q. B. 409. (2) [1917] A. C. 249.

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

LORD ATKINSON. My Lords, I share the difficulty the late Master of the Rolls said, in this case, he felt in reconciling the case of *Davies* v. *Rhymney Iron Co.* (1) with the case of *Cremins* v *Guest, Keen & Nettlefolds* (2), and also in reconciling all the authorities on the point as to when and under what circumstances an injury by accident can properly be held to have been sustained in the course of a workman's employment within the meaning of the Workmen's Compensation Act of 1906. I do not wonder at his difficulty in reconciling the two cases above mentioned, for this reason if for no other—that in the first of the two the facts and findings of the county court judge are clearly, distinctly and unambiguously stated; while in the second these matters, as I shall presently show, are stated in such an incomplete, ambiguous and puzzling way that I think the case must be misreported.

In the first of them, according to the report, the workman was a collier in the employment of the defendant company the owners of a colliery, and also of a little railway about $1\frac{1}{2}$ miles in length leading from the colliery towards the workmen's homes. On this railway the company ran trains to take some of the colliers, including the sufferer, to and from the colliery in the direction of their homes. It was quite optional with the workmen whether they travelled in the train or not, and if they did travel in it they were not charged anything for the service. The company were not in any way bound to carry the colliers upon the train. The injured workman, in descending from the train when it was some distance from the colliery, fell and was injured. Though the accident occurred before 1906, nothing turned upon the point of the scene of the accident being some distance from the colliery. The county court judge found that it was not a condition of the workman's employment that he should be carried to and from his work upon the train; that the company provided this train as a convenience for the workmen, and were not under any duty or obligation to provide it.

Collins M.R., in giving the judgment of the Court of Appeal, said the appellant (i.e., the workman) left his place of work

(1) 16 Times L. R. 329. (2) [1908] 1 K. B. 469.

and availed himself of the facilities given by the company. He went home by a route he was not bound to take. He was under no duty to the company at the time of the accident, and in no sense could the accident be said to be connected with the employment. The county court judge, who held that the accident did not arise out of or in the course of the workman's employment, was therefore right.

The Court expressed no opinion upon the point of the distance of the scene of the accident from the colliery. When one reads this report one is not left in any doubt on any point; the facts and findings of the county court judge, and the bases of the decision of the Court of Appeal are all brought before one's mind most clearly and distinctly.

Now, if one turns to the report of the second case the contrast is very marked. First, it does not appear from the report whether the workmen's train furnished the only means reasonably available by which the men could be brought to their employers' works; or whether other means equally available and convenient for that purpose were within their reach. Second, the county court judge is, in the statement of the facts, reported to have found that it was an implied term of the contract of service that the colliers residing at Dowlais should have a right to be carried from Dowlais to the platform at Bedlinog and back again free of charge, but when the then Master of the Rolls comes to give his recital of the county court judge's finding, he said that the finding was that "it was an implied term of the contract of service that these trains should be provided by the employers, and that the colliers should have the right, *if not the obligation*, to travel to and fro without charge."

I confess I feel greatly puzzled first by the use of the word "right," and, second, by the use of the words "if not the obligation." If the owner of a carriage, or a train, or a house, gives permission to another person to ride in his carriage, or be carried in his train, or to enter his house, and the person to whom the permission is given should avail himself of it, the licensee or invitee, if he may be so styled, has against every one but the person who gave the licence or the invitation a

H. L. (E.) 1923 ST. HELENS COLLIERY CO. v. HEWITSON. Lord Atkinson.

right to exercise the privilege given. If in *Cremins' Case* (1) it was established that the employer said to the collier, "I will provide a train to carry you to my works; you may avail yourself of it or not, just as you like. Other means of transit were available;" while the collier was in the train he would have a right to be transported as against every one but the employer, who might any day revoke the permission and discontinue the service.

Well, if the meaning of the word "right" be so ambiguous, what can one, with any confidence, say of the phrase "right if not obligation"? Is the phrase to be read as if it ran: "right though not obligation," or does it mean that it is doubtful whether the right given was not something almost, if not altogether, amounting to an obligation? If each collier was bound by his contract to travel to his employer's colliery by this provided train, then cadit quæstio. The collier would be in the course of his employment when he was doing a thing he was bound by his contract of service to do. But the conferring upon a collier of a privilege which he is free to avail himself of or not, would, prima facie, impose no duty whatever upon him to use it. It must, however, be borne in mind that if the physical features of the locality be such that the means of transit offered by the employer are the only means of transit available to transport the workman to his work, there may, in the workman's contract of service, be implied a term that there was an obligation on the employer to provide such means and a reciprocal obligation on the workman to avail himself of them.

The case of *Richards* v. *Morris* (2) illustrates well this principle.

The difficulty of reconciling all the authorities on this question as to the course of a workman's employment arises, I think, from the omission on the part of some of the Courts to frame some test which must be satisfied in order to bring an accident within the course of a workman's employment, leaving the county court judge in each case to decide whether the evidence establishes that the test is satisfied. I myself

(1) [1908] 1 K. B. 469. (2) [1915] 1 K. B. 221.

have been rash enough to suggest a test—namely, that a workman is acting in the course of his employment when he is engaged "in doing something he was employed to do." Or what is, in other and I think better words, in effect the same thing—namely, when he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service. The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment, but it is to be borne in mind that the word "employment" as here used covers and includes things belonging to or arising out of it.

For instance, haymakers in a meadow on a very hot day are, I think, doing a thing in the course of their employment if they go for a short time to get some cool water to drink to enable them to continue the work they are bound to do, and without which they could not do that work, and workmen are doing something in the course of their employment when they cease working for the moment and sit down on their employer's premises to eat food to enable them to continue their labours.

In the case of *Parker* v. *Owners of Ship Black Rock* (1) the decision of this House is distinctly based on the absence of this kind of duty to the employer which I have indicated. There a fireman on board a steamship went ashore with leave to buy some provisions for himself. His contract of service contained a clause that the crew should provide their own provisions. On returning to his ship he fell off the pier where his ship was supposed to be, but in fact was not, as she had been moved, and was drowned. Earl Loreburn, in giving judgment, said: "Did this injury arise out of this man's employment as a seaman on board this ship; did his employment involve as one of the things belonging to the employment that he should come ashore to get food and then return the same evening? My Lords, I cannot think that the case can be regarded as one in which it was his duty to his employers to come ashore and to be ashore and return to his ship." Lord Parker said: "It is not sufficient

(1) [1915] A. C. 725, 728, 729, 731, 732, 733.

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

Lord Atkinson.

in order to make this an accident arising out of the employment that the accident happened during a period when the man was lawfully absent from the vessel. In order to make it an accident arising out of the employment the absence from the vessel must be in pursuance of a duty owed to the employer. It appears to me that that is, shortly stated, the result of the decided cases. It is a line of decisions which lays down a distinctly workable rule upon the construction of an Act, the obscurity of which is exceedingly great, and I should be unwilling in any way to interfere with it." I think this last is a most valuable judgment. It is, I think, absolutely sound, and I only regret that the good working rule which Lord Parker indicates has not in later cases been resolutely applied. Lord Sumner, having dealt with the provisions of the seaman's contract about feeding himself, said: "There is no contractual obligation which made the deceased's errand on shore part of his employment in itself. It is suggested that as, in fact, he fed himself while on board, going ashore at a convenient port to get provisions constituted such a moral necessity arising specially from the terms upon which he was on board as places his errand on the same footing as though he had gone to discharge a duty to the ship. No authority is stated for that proposition, and I do not think it can be accepted." Lord Parmoor said: "I think it is clear that Christopher Parker" (i.e., the seaman) . . . . "was not absent from the ship in pursuance of any duty owed to the employer, and, in the absence of such duty, no liability would arise under the provisions of the Workmen's Compensation Act." Lord Wrenbury delivered, with his accustomed point and clearness, a most helpful judgment. He said: "The accident in question was that the man in returning to his ship from a lawful outing upon shore fell into the water and was drowned. In order to succeed it is not sufficient that he should show that but for his employment he would not have been at the scene of the accident. He must do more than that; he must show that it was the employment which took him to the place of accident." Later on he says: "It seems to me

that from the stipulation that he was to get his own provisions this consequence ensued—that the master was bound to give him reasonable facilities from time to time for going to buy them, but it does not follow that when he was buying them he was discharging any duty towards his employer. The man was doing an act which under the circumstances he had to do, but he was not doing an act which he owed to his employer the duty to do, and between those two things, it appears to me, rests the ground upon which this case is to be decided. It appears to me that this accident did not arise out of his employment, that it did not result from any obligation which had to be satisfied in order for him to perform the duty of his employment." This, in my view, is a decision as helpful as it is clear and authoritative. It bases the workman's right to recover in respect of an injury by accident, arising out of his employment, on the question whether he was, when the accident which injured him occurred, in the course of performing some duty arising out of his contract of service which he owed to his employer.

At the time when this case was decided, it was, I think, assumed that it had been irrevocably established by the case of *Moore* v. *Manchester Liners* (1) and *Kitchenham* v. *Owners of S.S. Johannesburg* (2) that a sailor, who, with the leave of the proper official, goes ashore, is, while he is on shore, to be taken to be in the course of his employment as a sailor upon his ship. That fact may account for the question whether the accident which caused the death of the seaman in *Parker* v. *Black Rock* (3) arose or did not arise in the course of the deceased's employment not being considered, and caused the learned Lords to deal exclusively with the question whether it arose out of his employment.

Since the case of *Davidson & Co.* v. *M'Robb* (4) was decided, I do not think that the decision in *Moore* v. *Manchester Liners* (1) can be taken as having the authority once claimed for it, but it would appear to me that the test as to the discharge by the workman of his duty to his employer

(1) [1910] A. C. 498.
(2) [1911] A. C. 417.
(3) [1915] A. C. 725.
(4) [1918] A. C. 304.

H. L. (E.) 1923 ST. HELENS COLLIERY CO. v. HEWITSON. Lord Atkinson.

laid down in *Parker* v. *Black Rock* (1) necessarily applies to the question whether the injury by accident for which he seeks compensation was sustained by him in the course of his employment or not. That question must, in my view, be determined in the one case as in the other by the same test—namely, whether the workman at the time he sustained the injury by accident was discharging a duty which he owed to his employer.

In the case of *Holmes* v. *Great Northern Ry. Co.* (2) A. L. Smith L.J. says: "They" (i.e., the defendants) "had started a new goods-shed at Hornsey, and he" (i.e., the workman) "had been told to go there and clean engines; it was his duty to obey the order." In *Davidson & Co.* v. *M'Robb* (3) Lord Finlay contrasted the two questions as to an accident occurring in the course of a workman's employment, and arising out of his employment. In both he says the word "employment" must bear the same meaning. His exact expression was "The word 'employment' must mean the same thing when in apposition with 'in the course of' as it means when in apposition with 'out of.' 'Arising out of the employment' obviously means arising out of the work which the man is employed to do and what is incident to it—in other words, out of his service. 'In the course of the employment' must mean, similarly, in the course of the work which the man is employed to do, and what is incident to it—in other words, in the course of his service. In the case of a domestic servant who sleeps and takes his meals in his master's house he is in the course of his service all the time—his service is interrupted if he goes out on his own business or pleasure. A workman who by the terms of his employment takes his meals on his employer's premises is in the course of his service in being there at meal-times. In either case the master or employer would be liable for damage caused by such an accident as happened in *Thom* v. *Sinclair* (4), as it would arise out of the employment, an incident of which is the presence of the servant or workman

(1) [1915] A. C. 725.
(2) [1900] 2 Q. B. 409, 411.
(3) [1918] A. C. 314, 315, 321, 326.
(4) [1917] A. C. 127.

upon the premises when partaking of his meals." And later on he says: "'In the course of the employment' does not mean during the currency of the time of the engagement."

Lord Dunedin says: "It is obvious that the addition of the words 'and in the course of' are meant in some way to qualify or further explain the words 'out of.' My own view is that they do the latter. It is in one sense difficult to imagine that there could be any injury held as arising out of the employment which would not also be in the course of the employment. But it may well be that the determination of the question whether at the moment of injury the workman was in the course of his employment may go to solve the question of whether the injury arose out of the employment. Let me instance the case of a domestic servant who is run over in the street. Given but the two facts that the man is, e.g., a butler, and that he is run over in the street, you would not be able to decide whether the injury arose out of the employment or not. The facts are consistent with either supposition. But given the further fact that either (1.) he has been sent by his master on a message, or (2.) that he is enjoying the evening out, then you can determine whether he is in the course of his employment or not, and from that, if being run over in the street is one of the inherent dangers of the streets, you will be able to determine whether the injury arose out of the employment or not." Lower down he said: "In my view 'in the course of the employment' is a different thing from 'during the period of employment.' It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work—e.g., in the workman's case, the taking of meals during the hours of labour; in the servant's, not only the taking of meals, but resting and sleeping, which follow from the fact that domestic servants generally live and sleep under the master's roof." I adhere to the opinion I myself expressed in that case. I think the words "arising out of" suggest the idea of cause

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

Lord Atkinson.

and effect, the injury by accident being the effect and the employment, i.e., the discharge of the duties of the workman's service, the cause of that effect, and that the words "in the course of his employment" mean while the workman is doing what he is employed to do, i.e., discharging the duties to his employer imposed upon him by his contract of service. The word "employment" in this connection must cover and include the things necessary and incident to the employment which I there mentioned.

I am unable to find any decision of this House qualifying or disapproving of the test laid down by the case of *Parker* v. *Ship Black Rock* (1), unless indeed it be the case of *Armstrong, Whitworth & Co.* v. *Redford.* (2) In that case, Lord Finlay, dissenting, applied the test I have already mentioned as furnished by *Parker* v. *Ship Black Rock.* (1) He said: "It was not in pursuance of any duty to her employers that the claimant went into the canteen and the accident did not result from any obligation which had to be satisfied in order to perform the duties of her employment." He then points out that the accident was wholly different from the accident in *Bell* v. *Armstrong, Whitworth & Co.* (3), which occurred in the public street and was an ordinary street accident.

Lord Dunedin says: "The canteen here might just as well have been in another place altogether, separate from the plot on which the works stood. If so it would have been, I think, quite impossible to say that a girl going there instead of going to her own home was doing something so connected with her employer's work as to be in the course of her employment. The test seems to me to be, not the situation of the premises, but whether resort to the premises is part of a duty owed to the employer." Both these noble Lords rest their judgments on what, in my opinion, the decisions of this House establish as the true test—namely, the duty of the employee to the employer. I assume that Lords Sumner and Parmoor did not apply this test. If they did, I apologise for my error; but I am quite certain that

(1) [1915] A. C. 725. (2) [1920] A. C. 757, 765, 773, 780.
(3) 12 B. W. C. C. 138.

Lord Wrenbury, as reported, did apply it. He said: "In the present case I say no more than that I think that the girl was in the course of her employment when, in hurrying down the stairs to achieve punctuality in 'clocking on,' she was endeavouring to comply with the duty of punctuality which she owed to the employer, and that the stairs being 'very slippery' she was exposed to the danger which resulted in the accident by the fact that it was incidental to her employment that she was allowed to be and was in that place. On these grounds, I think that the appeal should be dismissed."

Well, if at least three of the five noble Lords who heard this case applied, as they evidently did, the test laid down in *Parker* v. *Black Rock* (1), it is impossible to hold that the decision in that case is in any way qualified or weakened by the decision in *Armstrong, Whitworth & Co.* v. *Redford.* (2)

I now turn to the evidence and ask myself if there is any evidence to show that there was an obligation upon the appellants arising out of their contract of service with their colliers to provide this train service, and any correlative obligation upon the miners arising from the same source to use it. If all that has occurred is this, that the coalowner, the master and employer of a number of colliers, of whom Joseph Hewitson was one, arranged with the London and North Western Railway Company to run trains from Flimby Station to Siddick Station on the days and hours named, and to carry on such trains any of the colliers who might choose to travel on them without exacting any payment from these men, but merely requiring a guarantee from them against seeking to recover any damage for breach of the railway's common law duty to carry their passengers with reasonable care, and that upon the other side the colliery owner said to his workmen: "I, by arrangement with the railway company, have secured that trains will be run for your convenience to bring you to your work. You are free to travel by them or not just as you please, if you do travel by them you must guarantee the railway company against seeking damages for any breach of their common law

(1) [1915] A. C. 725. (2) [1920] A. C. 757.

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

Lord Atkinson.

liability in the event of your being injured by reason of their neglect to carry you with due care, and I will deduct from your wages one-half the sum I pay to them for carrying you "— if that were substantially all that occurred and the train was not, as was the boat in *Richards* v. *Morris* (1), the only means by which these colliers could gain access to the colliery, it would only be a case of a privilege being offered to the colliers of which they might avail themselves or not as they pleased, in which case they, in travelling by the train, would not be discharging any duty to their employers imposed on them by their contract of service, and consequently could not recover damages in respect of injury by accident sustained en route. If, on the contrary, the colliers were by their contracts of service bound to travel to and fro by these trains, they would in travelling by them be discharging a duty imposed upon them by their contracts of service, and an injury by accident such as Hewitson has sustained would be an injury by accident arising out of and in the course of his employment entitling him to receive damages under the Workmen's Compensation Act.

The county court judge finds in favour of neither of these alternatives, but with apparently a passion for ambiguity he copies the phrase occurring in Lord Cozens-Hardy's judgment in *Cremins' Case* (2), and finds as a fact that it was an implied term of Hewitson's contract of service that the trains should be provided by the employers and that the colliers should have "the right if not the obligation" to travel to and fro in them. What is the meaning of such a finding as that? Does it mean that the workman might go by train or not go by it as he pleased, or does it mean that the collier was by this implied term bound to go by it? So much for the finding on facts. Then one comes to his findings on law. He finds, so far as it is a question of law, whatever that may mean, that the contract of service implied included the time the accident occurred, that is the employment began when the man entered the train and ceased when he left it. He also thinks it was obligatory on this man, who lived six miles away

(1) [1915] 1 K. B. 221. (2) [1908] 1 K. B. 469.

and had to be when on the day shift at his work at 5.45 A.M., to use the train if he wished to continue in his employers' service. I have endeavoured (see *Hutchinson* v. *M'Kinnon* (1)) to suggest to county court judges as to how they should shape their awards, and pointed out in *Herbert* v. *Samuel Fox & Co.* (2) the objection to finding in the words of the statute. This award shows it was labour thrown away.

This last passage of the statement is unintelligible to me. It can hardly be that the county court judge considered that a finding on a question of fact, becomes when there is no evidence to support it, a finding of law. It is clear that no contract was entered into between the respondent and the London and North Western Railway Company, save the contract of indemnity already mentioned. The contract as to running these trains and carrying the colliers in them was made between the appellants and the railway company and the appellants only deducted from the wages of their employees half the fares they themselves paid the railway company. Tickets, incorrectly styled railway tickets, copies of which are printed at p. 14 of the appendix, are obviously used to identify the colliers who avail themselves of the privilege or contractual right, whichever it may truly be, of travelling on these trains. For this reason the ticket bears the number of the workman and number of his pit, but the railway company does not take any part in the issue of these tickets.

Hewitson, the respondent, proves that the rear van of the colliery trains had printed on it the words "Siddick Colliery train." He explains how the trains are timed to answer the shifts, states that he got his ticket from the colliery pay office; that 1*s.* 8*d.* per week is deducted from his pay under the head of offtakes, that he does not pay anything to the railway company, that 75 per cent. of the men who travel by these Siddick trains are miners in the colliery in which he works—that men belonging to other works, such as the respondent's son who works in the Gillhead Firebrick Company, at Trimley, also travel on these trains. Some of the men working in his own colliery go there by bus. The railway company

(1) [1916] 1 A. C. 471, 476. (2) [1916] 1 A. C. 405, 413.

H. L. (E.) 1923 ST. HELENS COLLIERY CO. v. HEWITSON. Lord Atkinson.

allow them to go by the 11.45 ordinary train on Saturdays to Siddick platform to draw their pay. There are four trains, 5.20 A.M., 6.55 A.M., 12.45 P.M., and for night shifts 10.20 P.M. He should walk if there were no trains or perhaps get work nearer home. It is an advantage to go by the train for 1*s.* 8*d.* It would be 3*s.* 9*d.* for the ordinary workmen's fare. John Barker, who is a miner's agent, states he has worked at the Siddick Colliery for sixteen years. He practically repeats Hewitson's evidence, says 90 per cent. of the passengers on these trains are miners, and that the servants of the railway company manage the trains. That is the whole of the case made on behalf of the claimant Hewitson.

Thomas Banks, the appellants' agent, produces the agreements with the railway company already referred to. Says trains are run under them by the latter company; 1*s.* 8*d.* is deducted from the men's wages, it used to be 9*d.*; both are less than the fare for ordinary ticket. The colliery company guarantee a minimum number of men travelling. There is a scale. "We" (i.e., the colliery company) "give the company" (i.e., the railway company) "weekly the number of men who are going to use the trains. Other men use the special as well" (i.e., as well as the miners of Siddick Mine). "That is the railway company's own affair. The men are given a ticket. Before they get it they sign an indemnity form. We send this to the company. The men pay 6*d.* stamp for it. We also indemnify the railway company. The agreements can be terminated at any time. There is no Joint Committee or Conciliation Board record of any agreement to provide trains. There is no such agreement by the men in the office of my" (i.e., the appellant) "company. The railway company sends the train when we want it."

In these cases under the Workmen's Compensation Act the workman claiming compensation must prove his case. In my view the evidence in this case does not establish that the colliery company was bound to provide these trains for their workmen to carry them to their work in the colliery. Nor that the workmen were on their side bound to travel to their

work by those trains ; nor yet that there were no other means reasonably available by which they could travel to their work.

I think the legitimate conclusion to be drawn from the whole of the evidence is that the appellants, in order to convenience their workmen, give to them the privilege of being carried on these trains to the colliery of the appellants on payment of a very small sum of 1*s.* 8*d.* per week, of which privilege the workmen (including Hewitson, the respondent) were free to avail themselves or the contrary.

In my opinion, the evidence does not establish that the workmen of the appellants in travelling to or from the appellants' colliery in these provided trains were discharging any duty to their employers which their contracts of service bound them to discharge. I am therefore of opinion that the injury by accident which the respondent Hewitson unfortunately sustained did not arise out of or in the course of his employment. The evidence does not, in my view, justify or sustain the conclusions of law or fact which the learned county court judge has drawn from it. I am therefore of opinion that the appeal succeeds, that the decision appealed from was wrong, and should be reversed, as also should the decision of the learned county court judge.

LORD SHAW OF DUNFERMLINE. My Lords, your Lordships are of opinion that this appeal should succeed. I feel myself, with much respect, constrained to differ. It might be unnecessary for me to add anything by way of explanation of my dissent, which, of course, must be wrong. But the case, my Lords, in the view which I take of it, is one of far-reaching importance, and your Lordships will perhaps forgive me for expressing my own view in some, though brief, detail.

In these cases, my Lords, the authorities are legion ; and the language of the statute is too apt to be submerged by them. It is the practice to cite over and over again large numbers of them and very often to do so in violation of the canon that, when cases depend upon fact, then a variation in fact deprives the alleged precedent of value. A few

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

Lord Shaw of Dunfermline.

general principles may, however, emerge from this mass of authority, and, above all, the language of the statute must still be allowed to speak for itself. The question in this case is whether the accident to this unfortunate workman arose out of and in the course of his employment.

So far as the facts are concerned the nearest analogies are found in the case of *Cremins* v. *Guest, Keen & Nettlefolds* (1); *Walton* v. *Tredegar Iron Co.* (2); *Gane* v. *Norton Hill Colliery Co.* (3); and the present case. In the case of *Cremins* (1) a large number of colliers who resided six miles from the colliery where they were employed were conveyed every morning by a train, composed of carriages belonging to the employers but driven by the railway company, to a platform a quarter of a mile away from the colliery. "The colliers were conveyed free of charge, and it was an implied term of the contract of service that colliers residing at D. should have the right to travel to and fro without charge. One of the colliers was knocked down and killed while waiting on the platform for the return train." It was held by the Court of Appeal "that the accident arose in the course of the employment, which began when the colliers entered the train in the morning and ceased when they left the train in the evening." It was a powerful Court which held that, consisting of Cozens-Hardy M.R. and Fletcher Moulton and Farwell L.JJ.

But I need not give the details of these cases which I have cited, because the whole of the law of them is summed up in a passage by Farwell L.J. in that of *Gane*. (3) He says: "It is well settled that the employment is not confined to the actual working whether in a pit or at any other trade in which the workman may be engaged. He is employed not only to work in the pit, but also to do other things that he is entitled to do by virtue of his contract of employment; for example, he is entitled to do, and therefore employed to do, such acts as coming on the employer's premises, passing and repassing for all legitimate purposes connected with his

(1) [1908] 1 K. B. 469. (2) 6 B. W. C. C. 592.
(3) [1909] 2 K. B. 539, 544–5.

work on the premises, such as getting to the pit's mouth, going to get his wages, going to make proper inquiries from proper officers, or taking a train which he is entitled to use by virtue of his contract of service, as in the cases of *Cremins* v. *Guest, Keen & Nettlefolds* (1) and *Holmes* v. *Great Northern Ry. Co.* (2) All those things that he is entitled to do by virtue of his contract he is for the purposes of the Act employed to do, and they are therefore within his contract of employment. I would qualify this by saying that he must make a reasonable user of the facilities and rights which are given to him in this way."

If this appeal is successful all these cases must be held to have been wrongly decided. My own opinion is that these decisions, as well as the decision of the Court of Appeal in this case, were, all of them, in accord not only with the good sense and justice of the position, but proceeded upon a correct interpretation of the statute and were sound in law.

Thus far for analogies in fact. As to the main principle to be applied I do not find, my Lords, that the able discussion on both sides of the Bar has led me to modify in any respect the statement of the point which I made to the House in the course of my address in the case of *Thom* v. *Sinclair*. (3) May I accordingly venture to repeat that " my view of the statute is that the expression ' arising out of the employment ' is not confined to the mere ' nature of the employment ' ? The expression, in my opinion, applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute ' arising out of the employment ' apply." That opinion substantially showed my estimate of what was the scope and meaning of the word " employment " under the statute. I respectfully adhere to that view (which applies equally to the phrase " in the course of the employment "), and I do not find that anything has happened in the decisions to weaken it. On

(1) [1908] 1 K. B. 469. (2) [1900] 2 Q. B. 409.
(3) [1917] A. C. 127, 142.

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

Lord Shaw of Dunfermline.

the contrary, not a little has happened to confirm it. In *Davidson* v. *M'Robb* (1), Lord Finlay L.C. said: "The word 'employment' must mean the same thing when in apposition with 'in the course of' as it means when in apposition with 'out of.' 'Arising out of the employment' obviously means, arising out of the work which the man is employed to do and what is incident to it—in other words, out of his service. 'In the course of the employment' must mean, similarly, in the course of the work which the man is employed to do, and what is incident to it—in other words, in the course of his service." Lord Dunedin, in the same case, dealing with the expression "in the course of the employment," says: "It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work." Later on, he adds, referring to the authorities, a passage illustrating the kind of incidents to employment and dealing with a topic very near to, if not identical with, the present case—namely, that of a provided access to the actual place of work. "The upshot of it is," he says, "that there is no case where liability has been found in which the accident has occurred at any place other than what may be termed the provided access to the ship. If an accident occurs there it may well be, and I agree it is, involved in the decisions, that when a sailor is leaving his ship by the provided access, or has reached the provided access on his return, he has not left the course of his employment in the first case—in the second he has returned to it. And obviously, if the provided access is defective, as was the case in *Moore's Case* (2), it is easy to come to the conclusion that the accident arose out of the employment."

Cremins (3), *Walton* (4), *Gane* (5) and the present case, as decided in the Court of Appeal, appear to me to have been in entire accord with the definition of employment as including

(1) [1918] A. C. 304, 314, 321, 322.
(2) [1910] A. C. 498.
(3) [1908] 1 K. B. 469.
(4) 6 B. W. C. C. 592.
(5) [1909] 2 K. B. 539.

what is incidental to it, as affirmed thus repeatedly in the opinions delivered in the House of Lords as just referred to.

Let us inquire, my Lords, accordingly, why this workman is held not to have been within the course of what was truly incidental to his employment on the occasion on which he was injured. He and other 500 men resided six miles from Siddick Colliery—namely, in Maryport. To promote, most properly, the interests of the colliery by the transport of suitable labour, the following arrangement was made. The colliery company agreed with the London and North Western Railway Company that the latter would provide special trains to be timed to suit the beginnings and endings of the colliery shifts. Intimation was to be given periodically by the colliery to the railway company of the number of men to be provided for. Slump payments were to be made by the colliery company to the railway company. Further, the colliery undertook to absolve the railway company from their responsibility for safe carriage of the men. That matter of the carriage of the men was to be covered by the contract which the men were to make with their employers.

So far of the relations between colliery company and railway company. As between the colliery company and the men the bargain was this: (1.) a charge of 1*s.* 8*d.* a week was to be made on each man using the line; (2.) the man's payment to the employers for transport was to be made by way of "offtake" from his wages; (3.) the workman was to covenant to absolve the railway company from their responsibility to him for safe carriage.

I attach great importance to this. It differentiates this case entirely from all those in which the workman going to his work did so merely as, and on the same terms as, a member of the general public. The language of the forfeiture of right by the workman is comprehensive. "Neither I, nor my executors or administrators, or relatives, shall have any claim against you (the railway company) by reason of any accident, injury or loss which may happen to me or my property, while joining, travelling by or alighting from such trains, or while upon your railway or property, notwithstanding any such

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

Lord Shaw of Dunfermline.

accident, injury or loss is occasioned by the negligence of you or any of your officers or servants." The whole of these arrangements were part of the contract of employment; the workman signed the stamped contract of railway indemnity, and was debited with 6*d.* for the stamp by the employers off the wages. And finally, the payment for the weekly pass was deducted on the pay sheet from the wages paid, the deduction being made under the head of "offtake." These arrangements continued for the whole twelve years of service. The company and the man were thus brought into intimate and continual daily relations. The workman secured his access to his work, the company provided the means of transport.

Upon the discussion of this case at your Lordships' Bar counsel for the appellants very properly conceded that the case stood in law precisely on the same footing as if, so far as the workman was concerned, the colliery company owned the line and worked it themselves.

So far, accordingly, as employment goes, the contract of employment itself embraces the carriage of these workmen from Maryport to the Siddick Station. The case was much stronger on fact than *Cremins*. I entirely agree with the county court judge upon that topic; this was not merely a case of the free offer of travelling facilities to any who cared to avail themselves of such an offer, but it was an actual paction, the employers granting the passport and coming under the obligation of the carriage, and the workmen paying their passage to the employers. In my opinion this is quite a clear case of the employment beginning when the men entered the train. In the terms of their contract of employment from that moment they had closed the bargain with the employers as per their contract of employment, they secured by deduction from their wages this mode of access to the work of the colliery which they had to do, and this mode of access the employers were bound by contract to provide.

The case of the respondent is illustrative. His contract of employment had lasted for twelve years; he had used the railway for that period and regularly paid to his employers by way of deduction from his wages his fare for the passport

given. Not only so, but in the knowledge of both employer and workman the position of the latter was completely dissociated from that of a passenger with the ordinary rights of passengers as against the railway and was embraced within the contract which he made with his employers as such. In the course of doing that thing which was the subject of onerous contract with his employers, he met his injuries by the derailing of the train.

The answer, however, made in argument, was to the effect that although his passage to the works per the railway was paid for to his employers and was part of his contract of employment with them, still what was paid for was a right, a privilege, and he was not obliged to use it. He might have provided himself with some other means of transport. To apply accordingly that to the position of the respondent himself, it would mean in the concrete this: although you have your contract of employment, in gremio of which is this right of carriage to your work, which your employers are obliged to furnish and have furnished, yet nevertheless on this October morning it was within your power to abandon your rights as against your employers to go the six miles by the 5.15 special train provided and paid for by you in the terms of your bargain, to relieve your employers from their duty to carry you by the transport provided, and to start earlier in the dark and reach the colliery by cycle or on your own feet.

My Lords, if this doctrine of excluding from the scope of the terms of employment those things and dangers which merely spring from the exercise of rights within a contract of employment—if this doctrine be sound, I know not where it is to stop. A man goes for his wages from the yard to the office by a bridge provided by the employers and the bridge is broken or blown down and he is injured. The answer, I presume, would be: no claim against the employers, because to go for his wages he might have chosen to walk round half a mile—to use the bridge was only his right—or, indeed, he might have chosen to go without his wages at all, he was not obliged to lift his money,—to do so was only his right.

H. L. (E.) 1923 ST. HELENS COLLIERY CO. v. HEWITSON. Lord Shaw of Dunfermline.

My Lords, I can give no countenance to such an argument, which seems to me not only to fly in face of the decisions quoted, but to be an unreasonable limitation of the word "employment." I think the more reasonable view is that this man's employment was just exactly as wide as his contract, and that he was within the scope of his employment and in the course of it, not only in performing duties but in exercising rights under his contract. Furthermore, it stands to reason, as I view it, that upon the facts stated, this conveyance of the workman was part and parcel of the employment in the sense of being, to say the least, one of its incidents. I think, further, that to all intents and purposes it was a necessary incident of the contract. The learned county court judge appears to me to have been right when he found as follows: "I think also it was obligatory on this man who lived six miles away and who had to be, when on the day shift, at his work at 5.45 A.M., to use the train if he wished to continue in the employer's service."

My Lords, I have referred to the principle that the word "employment" under the statute should be held to include the incidents of the employment and there are two other principles which also may be mentioned, and which occur in many of the cases. The one is that the course of the employment may be interrupted by the workman's own conduct and so a new causal factor be introduced and a new peril added which was beyond the scope of the contract of service. It is sufficient to say that nothing in the workman's own conduct occurs to bar the claim in the present case.

A further principle, however, more nearly illustrates negatively the main idea of employment under the statute, because it shows what it does not include. I refer to the case where liability does not arise, because the workman was not engaged upon or in the course of his employment but upon purposes of his own apart from the employment. If he had been, in sport or out of private curiosity, or for some other purpose of his own not incidental to his service, doing something or proceeding somewhere out of the course of the incidents of his employment, then a claim for compensation

fails. But this, in my view, illustrates very much in favour of the respondent his right to compensation. For the respondent was not in the derailed train for any purpose of his own apart from his employment. Apart from his employment he would not have been on the train, his only object was to get to his work by the means provided in terms of his contract with his masters. In the view which I humbly take, the denial of compensation for his injuries is a defeat not only of the intention but of the terms of the Workmen's Compensation Act.

My Lords, I feel it to be my duty to add the following observations. I desire, respectfully and pointedly, to call the attention of the Legislature to the position of peril in which large classes of His Majesty's subjects may be placed by the decision about to be announced from the Woolsack. The case of the respondent is typical of that of 500 men employed in this single colliery. How many other collieries and works having similar contracts throughout the kingdom is unknown; their number may be large, and, looking to the difficulties of housing and building, may quickly grow larger. In all of these cases the position of the men requiring to be transported will be very seriously affected. They will have no railway passengers' right; they will have bargained that away by their contracts with their employers, who will have obtained a material decrease of fares by the obliteration of the men's right of free carriage. And they will have no rights under the Workmen's Compensation Act, because the accident occurred not in the course of the employment but in the course of the transport to it provided by the contract of employment. Unhappily, in such businesses accident on a large scale is not unknown. In this single colliery hundreds of men might have been killed without any fault on their part, and while travelling for no purpose of their own but for the purpose of the employment, and in the fair and proper exercise of their rights under their contracts of employment. Under this decision they, if injured, and their dependants if they are killed, are without compensation and without remedy. It is because I humbly but strongly feel that

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

Lord Shaw of Dunfermline.

Parliament did not mean this, that I have ventured to suggest that the case demands the attention of the Legislature.

My Lords, at the discussion of this case I raised the question whether the sums charged for fares were permissible deductions from wages under the Truck Acts, and I was answered that they were. I am not deciding the point, but assuming it. If they were not, then upon a large scale, offences against the Truck Acts have been committed by the employers. But if they were, as I assume and as I suppose for the purposes of this case I am bound to assume, then how did they come to be legitimate exceptions to the law that the entirety of the wages must be paid in coin of the realm? The answer possibly is that this deduction for wages became permissible under the Truck Act of 1896. Sect. 3 of that statute provides that an employer shall not make any contract with any workman for any deduction from the sum contracted to be paid by the employer to the workman, or for any payment to the employer by the workman—these are the words—"for or in respect of the use or supply of materials, tools or machines, standing room, light, heat, or for or in respect of any other *thing to be done or provided by the employer in relation to the work or labour of the workman*" unless (as I understand was done here) the terms are in writing and duly notified and other conditions are complied with. This, at least, shows that the Legislature intended comprehensively to deal with deductions for everything done or provided (including transport of men by a provided train) in relation to—a very wide phrase—the work or labour. As I say, I do not venture to decide the point; but I must add that these statutory truck provisions, not referred to in the discussions below, appear to me to confirm the view taken both by the arbitrator and the Court of Appeal. This workman accordingly, by deduction from his wages, has properly paid for what was "in relation to the work or labour"—namely, his transport to his work—this under one Act of Parliament; whereas under the judgment proposed, while in respect of his deduction from his wages he is being

carried per contract he is not "in the course of his employment"—this under another Act of Parliament. I cannot agree that this is or can be the law.

LORD WRENBURY. My Lords, before coming to the facts of this case I must once again say something as to the meaning of those troublesome words upon which so much question has arisen, "personal injury by accident arising out of and in the course of the employment."

The words "out of" connote origin. In matters physical a plant arises "out of" a seed—a vessel may be wrecked "out of" the violence of the waves. In matters metaphysical a motor-car accident may arise "out of" the carelessness or "out of" the inefficiency of the driver. The words indicate an origin, a source or a cause. It has been said that the expression "arising out of the employment" applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. I am disposed to agree with this if the wideness of the language does not lead to uncertainty in the meaning. A first step is to ascertain whether the accident had its origin in the employment and therefore arose out of it.

The words "and in the course of" are not equivalent to "during." The accident must occur during the employment, but more than that, it must occur "in the course of the employment." The employment may be by the year. The accident must, of course, be one which happens during the year, but more than that, it must be in the course of the employment during the year. The employment may be to do some defined manual work, say, hewing coal, but the accident need not arise when the man is actually using his pick. He may be going down in the cage. He may be resting between shifts. He may be taking a meal. He may be merely standing by, waiting for the next job. All these, and such as these, are not "the employment" but are incidental to the employment. The man is in the course of his employment—is engaged in his employment in all such cases. "They also serve who only stand and wait." In every

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

Lord Wrenbury.

case the facts have to be ascertained and discrimination made between the time during which or the place at which the employment is and those during or at which it is not being carried on.

A first step is to ascertain what is the employment. If the workman is doing anything that his employer could and did, expressly or by implication, employ him to do or order him to do, and the accident occurs when he is doing it, the case is within the Act. If, for instance, the employer says "Go by the 9.45 train to Manchester and there do such and such a job" the employer is on the risk directly the man goes, as he is ordered. This was the case in *Lancashire and Yorkshire Ry. Co.* v. *Highley*. (1) If the man is paid by time his time begins from the moment of his going. If, again, the employer (being entitled so to do) says, "Come to your work by a particular route," the employer is on the risk when the man is coming by that route. This is so, because in each of these cases there is an obligation. The man enters the assigned train or goes by the assigned route, because he has received and is obeying an order to do so. And there are cases which would, I suppose, be within what are called above the "incidents" of the employment, in which the journey to and from work may fall within the employment, because by implication, but not by express words, the employer has indicated that route, and the man owes the duty to obey. But the mere fact that the man is going to or coming from his work, although it is a necessary incident of his employment, is not enough.

A useful test in many cases is whether, at the moment of the accident, the employer would have been entitled to give the workman an order, and the man would have owed the duty to obey it. If the employment be to do some definite manual work at some definite spot, e.g., to hew coal in a mine, and the workman is, at the moment of the accident, not at or near to that spot, but is on the surface on a public road or in a public train or other vehicle six miles from the mine, the mere fact that he is going to or from his work does not

(1) [1917] A. C. 352.

raise any right in the employer, then and there, to give him an order or any duty in the man to obey it. The man is not at that moment in the course of his employment.

The respondent has relied upon a sentence in the judgment of Farwell L.J. in *Gane* v. *Norton Colliery Co.* (1) It runs thus: "All those things that he is entitled to do by virtue of his contract he is for the purposes of the Act employed to do, and they are therefore within his contract of employment." This is one of those incautious expressions which we are all liable to use and which, when taken from their context, may be applied in a sense which their author would have immediately repudiated. Suppose the man is by virtue of his contract of service entitled to take a fortnight's holiday. Is he employed to take a holiday? If by virtue of his contract he is entitled to take vegetables from his employer's garden, is he employed so to do? During his holiday, or when he is digging potatoes, is the employer liable in respect of an accident? Of course not. The Lord Justice would have been the first to repudiate any such meaning attached to his words. He had in the sentence immediately preceding mentioned several acts, such as coming on his employer's premises, and so on. It is with reference to such acts as he had specified that he used the words. To understand properly the sentence I have quoted there must be added some such words as "in the matter or course of his employment," so that the sentence will run, "All those things that in the course of his employment he is entitled to do by virtue of his contract he is for the purposes of the Act employed to do." It is, in fact, only another way of bringing in what other judges have called acts incidental to the contract of service. It advances the matter little, if at all. It still remains to inquire whether the occasion was one in which the man was "in the course of his employment." The fact is, that there is a radical difference between an obligation and a right—between that which it is a man's duty to do and that which he is entitled to do without breach of his duty. In the latter case it is beside the matter to say that

(1) [1909] 2 K. B. 539, 545.

H. L. (E.) 1923 — ST. HELENS COLLIERY CO. v. HEWITSON. — Lord Wrenbury.

it is by virtue of his contract of service that he is entitled to do it. The man who is taking the fortnight's holiday to which he is entitled under his contract of service is not in the course of his employment by absenting himself from it. In the decisions there is found again and again the test of duty—I refer, in particular, to the decision of this House in *Parker* v. *Black Rock*. (1) Each in turn of the noble Lords who gave judgment in that case takes duty as the test. I may quote from Lord Parker: "In order to make it an accident arising out of the employment the absence from the vessel must be in pursuance of a duty owed to the employer." Lord Parmoor said: "In the absence of such duty" (namely, duty owed to the employer), "no liability would arise under the provisions of the Workmen's Compensation Act." The same principle lies at the root of *Armstrong, Whitworth & Co.* v. *Redford*. (2) In *Holmes* v. *Great Northern Ry. Co.* (3): "It was his duty," said A. L. Smith L.J., "to obey the order." *Bell* v. *Armstrong, Whitworth & Co.* (4) is another illustration of this proposition. The word "duty," however, is not to be taken in a narrow sense. It is not necessary that it shall be the man's duty to do the act; it suffices that he is engaged at the moment in doing his duty. If, as in *Stewart & Son* v. *Longhurst* (5), the accident occurs to the man in a place in which he would not be entitled to be, except in order to perform his contract of service, the test is satisfied, because he is there solely in pursuance of his duty. The same is a fortiori true if he was in a place where he was not only entitled to be, but was bound to be in order to perform his contract of service, as in the lightning case: *Andrew* v. *Failsworth Industrial Society* (6), and the case of the woman working in her employer's shed: *Thom* v. *Sinclair*. (7) Secus if he was in the dangerous place not in performance of any duty in his employment, but for purposes of his own: *Davidson & Co.* v. *M'Robb*. (8)

(1) [1915] A. C. 725, 729, 732.
(2) [1920] A. C. 757.
(3) [1900] 2 Q. B. 409, 411.
(4) 12 B. W. C. C. 138.
(5) [1917] A. C. 249.
(6) [1904] 2 K. B. 32.
(7) [1917] A. C. 127.
(8) [1918] A. C. 304.

Philbin v. *Hayes* (1), where the man was sleeping in a hut which he had rented from his employer, is another illustration.

Cremins v. *Guest, Keen & Nettlefolds* (2) and *Walton* v. *Tredegar Iron Co.* (3) which followed it are not consistent with that which I have said. They proceed upon the footing that if the workman was in a dangerous place in which it was no breach of his duty to be, a place in which his contract of service expressly or impliedly allowed him to be, if he voluntarily chose so to be, he is within the Act. My Lords, I think those cases were wrongly decided. The man is not in the course of his employment unless the facts are such that it is in the course of his employment, and in performance of a duty under his contract of service that he is found in the place where the accident occurs. If there is only a right and there is no obligation binding on the man in the matter of his employment there is no liability.

Turning to the facts of this case I will seek to apply the above principles. What was the origin, source or cause of this accident? The answer prima facie looks easy. The accident arose from the defective condition of the permanent way, or of the points of the railway of the London and North Western Railway Company. But this does not end the matter. The whole question—the real question—the relevant question—is what was the origin, source or cause of this accident to this man? The answer is not single but composite. It arose from two facts—namely, (1.) that the permanent way or the points were defective, and (2.) that the man was in the train. And in order to see whether the accident arose out of his employment it is necessary to see whether he was in his employment when he was in the train. The fact is that in the words "out of his employment" is contained implicitly that which is next expressed directly by the words which follow—namely, "and in the course of his employment." The two conditions of liability are not really two things of which the one is independent of the other. The

(1) 87 L. J. (K. B.) 779. (2) [1908] 1 K. B. 469.
(3) 6 B. W. C. C. 592.

H. L. (E.) 1923

ST. HELENS COLLIERY CO. v. HEWITSON.

Lord Wrenbury.

latter is a repetition by way of emphasis of one thing—namely, that the man must be in his employment when the accident occurs, and adds something—namely, that the man must not only be in the employment but that the accident must occur in the course of the employment. The injury must result from accident arising to him out of and in the course of the employment in which he is engaged at the time, so that the accident can arise out of it.

It follows that I have to see (1.) whether the man was in his employment when the train went off the line, and (2.) (if I find that he was) then whether the accident arose out of and in the course of that employment.

For myself, I am content to deal with the case as if the train were a special train for which the employers paid, and in which the workman was, by virtue of a term in his contract of service, at liberty to travel if he wished to do so. These facts do not to my mind indicate in any way that the workman was in the employment at the time. Suppose it is a term of the service, whether expressed or implied, that a man shall enjoy if he likes to accept it a convenience of this kind, that is no obligation of the employment. If he avails himself of it he is not at the same time accepting the obligation of employment while he is availing himself of it. The facts amount to no more than this: "You may go this way to and from your work at a reduced rate if you wish to do so and accept the terms on which the facility is granted." There was in this no obligation, and there arose in the workman no duty.

If I apply the other test which I have suggested, the workman when in the train owed no duty to obey an order the employers might there give him. He was not at the place where the assigned work of his employment was to be done. There was no question of mining at this place, six miles from the pit's mouth, and it was only in respect of mining and acts incidental to mining that he owed obedience to his employer.

I may add, however, in case it be thought material, that in my judgment the train was not in any relevant sense

the employer's train. The travellers paid for their conveyance and they paid the railway company for it, and this none the less because the sum they paid was reduced by the interposed machinery which resulted in their conveyance at a reduced rate—and that the payment was made not by the traveller direct to the railway company but was collected by the employer and applied by him in or towards the payment which the employer made in the aggregate to the railway company.

Further, when the man desiring to avail himself of the train agreed to a deduction of 1*s.* 8*d.* from his wages there arose, in my judgment, another contract which formed no part of his contract of service, although it was one which his contract of service entitled him to claim if he was minded so to do. For instance, suppose the case of a man who had worked in the colliery for a year and had lived close by—and suppose that he changed his residence to Maryport and then signed the necessary documents and received the necessary identification ticket to enable him to use the train, that man's contract of service would remain unaffected. He would have made voluntarily a new contract, and it was under the latter contract that he would have been travelling if he were in the train when the accident occurred.

It may be convenient to collect and say a few words upon some of the decisions that are reported upon the particular case of travelling to and from work by train. In *Davies* v. *Rhymney Iron Co.* (1) the workman failed on the ground that he was availing himself of a facility, that he was not bound to travel by that route, that he owed no duty in the matter. I think that case is right. In *Nolan* v. *Porter & Sons* (2) the man was going to work as a labourer for a ship scaler—a ticket was given him to go by train to the dock railway station. He went by train, and fell into the dock on his way from the station. He failed on the ground that it was not obligatory upon him to go by train and that his employment had not begun when he did so. That, I think, was right. In *Cremins* v. *Guest, Keen & Nettlefolds* (3) and *Walton* v. *Tredegar*

(1) 16 Times L. R. 329. (2) 2 B. W. C. C. 106. (3) [1908] 1 K. B. 469.

H. L. (E.) 1923 ST. HELENS COLLIERY CO. v. HEWITSON. Lord Wrenbury.

Iron Co. (1) the claimants succeeded. I have given my reasons for thinking that those two decisions are wrong. In *Holmes* v. *Great Northern Ry. Co.* (2) the claim succeeded on the ground that the workman had been told to go, and that it was his duty to obey the order. In that case an implied contract was found to exist to carry the man to Hornsey, to find him work there, and to bring him back. On those findings the decision, no doubt, was right. The employment began when the man started to go. In *Lancashire and Yorkshire Ry. Co.* v. *Highley* (3) the man was sent by the railway company, and was obeying the order of the company given by their foreman to do so. His employment began when he started to go. The decision against him was on another ground.

My Lords, I sympathise with the Court of Appeal in regard to the difficulty in which they stood, looking at *Davies* v. *Rhymney Iron Co.* (4) and *Cremins* v. *Guest, Keen & Nettlefolds.* (5) Your Lordships enjoy a freedom which the Court of Appeal had not. For the reasons which I have given, I think that the workman in this case is not within the Act and that this appeal succeeds.

LORD CARSON. My Lords, the state of the authorities by which the county court judge and the Court of Appeal felt themselves bound has been fully discussed by your Lordships, and I do not propose to pursue the subject further; but I would like to add this, that, ambiguous as the words of the statute are, I doubt if the authorities give any great assistance in elucidating them; nor do I feel certain that any definition can be framed, apart from the particular facts of each case, which will be found helpful to solve the meaning of the statute.

When I examine the facts of this case I can find no evidence that the respondent was ever employed to travel by the train to which the accident occurred. That seems to me sufficient to dispose of the case. When I look at the findings of the county court judge I think one realizes the embarrassment he felt in trying to work out a case upon the facts and bring it within *Cremins* v. *Guest, Keen & Nettlefolds.* (5) The

(1) 6 B. W. C. C. 592.
(2) [1900] 2 Q. B. 409.
(3) [1917] A. C. 352.
(4) 16 Times L. R. 329.
(5) [1908] 1 K. B. 469.

only finding of fact which he determines is that the miners should have the right to travel to and fro. But, my Lords, your Lordships will notice that when he comes to his findings of law he makes the statement that "it was obligatory upon this man, who lived six miles away, and who had to be, when on the day shift, at his work at 5.45 A.M., to use the train if he wished to continue in the employers' service." My Lords, I do not see how that is a finding of law at all. It is a finding of fact, and there is no evidence whatsoever by which that finding can be supported.

My Lords, I should like to add one word as to a portion of the speech just delivered by my noble and learned friend Lord Shaw. I do not share the anxieties felt by my noble and learned friend as to the results of the decision proposed by his Lordship from the Woolsack in this case, nor do I feel in a position to join in his recommendations to the Legislature. I have no information before me to lead me to a conclusion as to what would be the effect of putting an end to or interfering with voluntary arrangements for providing greater conveniences for workmen going to their employment. However, that does not appear to be a matter on which I am competent or bound to express any opinion.

I agree, my Lords, that this appeal should be allowed.

Order of the Court of Appeal reversed. Cause remitted back to the county court judge, with a direction to make an award in favour of the appellants and to do therein as shall be just and consistent with this judgment. The respondent to pay the costs in the Courts below, and also the costs of the appeal to this House.

Lords' Journals, Nov. 22, 1923.

Solicitors for the appellants: *Blyth, Dutton, Hartley & Blyth, for Chapman & Baxter, Whitehaven.*

Solicitor for the respondent: *W. C. Crocker, for Wood, Lord & Sumner, Whitehaven.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1923 *Nov.* 23.

STANDARD OIL COMPANY OF NEW YORK . . . . . } APPELLANTS;

AND

CLAN LINE STEAMERS, LIMITED . . RESPONDENTS.

Ship—Charterparty—Bill of Lading—Liability of Owners for Loss of Cargo—Unseaworthiness—Incorporation of the Harter Act—Exception of Owner's Liability for Master's Errors in Navigation—Obligation on Owner to use due Diligence to make Ship seaworthy—Competence of Master—Turret Ship—Omission to communicate to Master Shipbuilders Instructions as to Ballasting—Capsizing of Ship owing to Master emptying Water Ballast Tanks—Limitation of Liability—"Actual fault or privity"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

A ship of the "turret" type was chartered for a voyage from New York to China under a charterparty which incorporated the Harter Act of the United States. That Act provided that if the owners exercised due diligence to make the vessel in all respects seaworthy and properly manned they should not be held responsible for loss resulting from faults or errors in navigation or in the management of the ship. The charterers shipped a cargo under bills of lading which incorporated the Harter Act and also contained a clause exempting the owners from loss occasioned by "accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the . . . . master . . . . not resulting, however, in any case from want of due diligence by the owners of the ship)."

Shortly after leaving New York the master ordered two water tanks to be emptied, with the result that the ship capsized and sank. Nine years previously, after the loss of a sister ship by capsizing, the builders had sent to the owners a series of instructions for loading the ship, including an instruction that when she was loaded with a homogeneous cargo (as on the voyage in question) the water ballast tanks were to be filled. The owners had never communicated these instructions to the master, who was a competent seaman with long experience of turret ships:—

Held, (1.) that the ship was inherently unseaworthy in certain not improbable conditions unless special precautions were taken, which it was the duty of the owners to enjoin as being required by the structure of their ship, and that the owners were therefore liable for the loss of the cargo; (2.) that the owners were not entitled to the limitation of liability prescribed by s. 503 of the Merchant Shipping Act, 1894, as they had failed to prove that the loss occurred without their actual fault or privity.

Decision of the First Division of the Court of Session in Scotland 1923 S. C. 245 reversed.

* *Present:* EARL OF BIRKENHEAD, VISCOUNT HALDANE, LORD ATKINSON, and LORD PARMOOR.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland (1), recalling an interlocutor of the Lord Ordinary in favour of the appellants, the pursuers in the action.

The action was brought by the appellants, who claimed to recover damages from the respondents in respect of the loss of a cargo shipped by the appellants at New York on board the steamship *Clan Gordon*, belonging to the respondents, for conveyance to ports in China.

By a charterparty dated April 2, 1919, the respondents agreed to supply vessels to the appellants for carriage of the appellants' goods from the port of New York or Philadelphia (in the charterers' option) to ports (as the charterers might elect) in (among other countries) China. In terms of this charterparty the appellants shipped on board the *Clan Gordon* at New York under three bills of lading all dated July 26, 1919, a full cargo consisting of 12,500 cases of Pratt's Motor Spirit, 79,512 cases of refined petroleum, and 12,534 bags of paraffin wax to be delivered at Dalny and/or Taku Bar to the order of the appellants.

Having loaded the cargo, the *Clan Gordon* sailed from New York on July 28, 1919. At the time when she sailed two of her ballast tanks, Nos. 1 and 2, containing 95 and 195 tons of water respectively, were full. On July 30, while at sea, the captain, for the purpose of trimming the vessel more by the stern, ordered the water to be pumped out of the two tanks. When the tanks were nearly empty he ordered the vessel to be put hard aport, and, on this order being carried out, the vessel heeled over and gradually turned turtle and was totally lost with her cargo. The sea was calm at the time.

The charterparty provided that it should be "subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress approved on the 13th day of February, 1893, known as the Harter Act," and that bills of lading should be issued in conformity with that Act. Sect. 3 of the Harter Act provides: "If the owner of any vessel transporting merchandise or property to or from

(1) 1923 S. C. 245.

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel. . . . . "

The bills of lading under which the cargo was shipped incorporated the Harter Act and contained the following exceptions—namely: " perils of the sea or other waters . . . . or any latent defect in hull, machinery, or appurtenances . . . . or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them or by the ship's husband or manager)."

The *Clan Gordon* was one of seven turret ships built for the respondents in 1900 by William Doxford & Sons, Ld., Sunderland. Owing to the capsizing of a sister ship, the *Clan Ranald*, under similar circumstances in 1909, Messrs. Doxford, in 1910, prepared general instructions for loading for all turret ships built by them. These instructions were filled up for each of such vessels and sent to the owners. They were intended for the guidance of the master, and they contained a definite warning against loading these vessels with a full homogeneous cargo such as that carried by the *Clan Gordon* without retaining water ballast. The respondents, however, took no steps to bring these instructions to the notice of the officers commanding the vessels to which they applied, and the master of the *Clan Gordon* never saw these instructions until after the loss of the vessel.

The appellants (pursuers) by their condescendence averred that the *Clan Gordon* was unseaworthy when she sailed from New York, in that she was not properly equipped for the voyage in respect that she had not on board proper directions for the guidance of the captain for her loading and for preserving her stability, and in that the captain was not furnished

with the instructions for loading provided by the builders and was not instructed that special precautions were necessary (as they were) in the matter of keeping the tanks full while at sea; that this was owing to want of due diligence on the part of the respondents (defenders), and that without such instructions the captain was not in a position to command the vessel.

The respondents relied upon the Harter Act and the exceptions in the bills of lading, and contended further that in any event the loss of the *Clan Gordon* was occasioned without their actual fault or privity, and that consequently their liability was limited to 8*l.* per ton in accordance with s. 503 of the Merchant Shipping Act, 1894, as amended by s. 69 of the Merchant Shipping Act, 1906.

The Lord Ordinary (Lord Hunter) decerned against the respondents for payment to the appellants the sum of 97,892*l.* 17*s.* 7*d.* in full of the conclusion for damages, but the First Division by a majority (the Lord President, Lord Skerrington and Lord Cullen; Lord Sands dissenting) recalled the interlocutor of the Lord Ordinary and assoilzied the respondents from the conclusions of the summons.

1923. July 24, 25, 26. *Condie Sandeman D.F.* and *Normand* (of the Scottish Bar) for the appellants. The real cause of the capsizing of the ship was the pumping out of the water tanks owing to an error of the master due to his ignorance brought about by the negligence of the owners in not properly instructing him. The owners directly contributed to the error of management, and they rendered the ship not properly equipped by withholding from the master the necessary instructions. The respondents have failed to prove that they exercised due diligence to make the ship seaworthy and properly manned, equipped and supplied, and they therefore cannot take advantage either of the exceptions in the bills of lading or of s. 3 of the Harter Act, which is incorporated in the charterparty: *Moes, Moliere and Tromp* v. *Leith and Amsterdam Shipping Co.* (1); *The Glendarroch* (2);

(1) (1867) 5 M. 988, 991. (2) [1894] P. 226.

H. L. (Sc.) 1923 — STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

The Carib Prince (1); *International Navigation Co.* v. *Farr and Bailey Manufacturing Co.* (2); *The Wildcroft* (3); *McFadden* v. *Blue Star Line.* (4) The warranty of seaworthiness imposes on the shipowner an obligation to provide a vessel in all respects fitted for the voyage in contemplation, having regard not only to the perils which she may encounter, but to the character of the cargo. The ship must be fit to perform the service which she has undertaken. It is a breach of the warranty if the master be incompetent to command the vessel upon the intended voyage either by reason of his own want of seamanlike skill or by reason of his ignorance of something in the vessel herself affecting her safety. The complaint here is not that the master was not a competent seaman, but that he was not sufficiently instructed: *Tait* v. *Levi* (5); *The Schwan* (6); *Steel* v. *State Line Steamship Co.* (7) Unseaworthiness, though it must exist at the commencement of the voyage, may not be operative in the sense of causing damage until some accident of navigation intervenes, but, if the unseaworthiness operating along with such intervening accident causes damage to the cargo, the shipowner is liable, although he would not be liable for the consequences of the intervening accident alone. There being in the hands of the respondents an important document which they omitted to communicate to the master, they have failed to prove that the communication of that document would not have averted the catastrophe; but there is a high degree of proof to the contrary. Their negligence occasioned or contributed to the loss. Assuming that the respondents are liable in damages, they are not entitled to the limitation of liability prescribed by s. 503 of the Merchant Shipping Act, 1894, because they have failed to show that the loss occurred without their actual fault or privity: *Royal Exchange Assurance* v. *Kingsley Navigation Co.* (8)

Macmillan K.C. (of the Scottish Bar) and *MacKinnon K.C.*

(1) (1897) 170 U. S. 655, 661.
(2) (1900) 181 U. S. 218, 224–226.
(3) (1905) 201 U. S. 378.
(4) [1905] 1 K. B. 697.
(5) (1811) 14 East, 481.
(6) [1909] A. C. 450.
(7) (1877) 3 App. Cas. 72.
(8) [1923] A. C. 235.

(of the English Bar) (with them *Douglas Jamieson* (of the Scottish Bar)) for the respondents. The cases which raise the question of unseaworthiness owing to the incompetence of the master from exterior circumstances—namely, *Tait* v. *Levi* (1); *Moore* v. *Lunn* (2); *"Gunford" Ship Co.* v. *Thames and Mersey Marine Insurance Co.* (3)—have no application to the facts of this case. The vessel left New York physically fit and in a stable condition, and was in charge of a captain and crew, as far as seamanship was concerned, competent. It is said that the captain was not competent because he should have received the special instructions in regard to this ship. The appellants might have come into Court with a claim for non-delivery, in which case the onus would have been on the shipowners, but they come with a claim of unseaworthiness, and in that case, by the laws of both England and Scotland, the burden is on them to establish unseaworthiness. The important issues now are, (1.) was the ship not properly equipped for the voyage in respect that she had not on board proper directions for the guidance of the captain for loading and for preserving her stability? and (2.) was it necessary to furnish the captain with the builders' instructions for loading? What is the duty which is said to be incumbent on the respondents in this matter? How are the instructions to be brought to the notice of the captain? All is left vague. It is not enough to say the instructions ought to have been communicated. Suppose the captain dies during the voyage. It was part of the captain's duty to know how to load his ship. Water tanks are now well known. There is nothing extraordinary in a turret ship. Normally she is more stable than a wall-sided ship, but when she reaches a certain angle she has less recovering power. Water ballast tanks are not a specialty of turret ships. Moreover, this captain was experienced in the use of turret ships, which were in common use by the respondents and others. It is difficult to evaluate the document unless regard is had to the state of previous knowledge. Was it to be a jog to the memory of a man who ought to

(1) 14 East, 481. (2) (1922) 38 Times L. R. 649.
(3) 1910 S. C. 1072.

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

have had this knowledge, or was it a communication of a new piece of knowledge which the captain could not be expected to have? The primary cause of non-delivery was the loss of the vessel through an error of the captain, but it must be shown further that the accident did not result from want of due diligence by the owners. The Harter Act and the exceptions in the bills of lading are substantially to the same effect. The test in each case is, was it want of due diligence not to communicate these instructions? For the reasons above given this question should be answered in favour of the respondents. Assuming that they are liable in damages, their liability must be limited to 8*l.* per ton in accordance with s. 503 of the Merchant Shipping Act, 1894. To entitle them to this limitation of liability the owners must prove that the loss occurred without their actual fault or privity. But that does not mean fault or privity by construction. The fault or privity of a subordinate will not do: *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (1) This particular matter was entirely within the province of the marine engineer, who is not the alter ego of the respondent company: *Smitton* v. *Orient Steam Navigation Co.* (2)

Condie Sandeman D.F. in reply. It was gross negligence on the part of the owners to treat this warning coming from the builders after a catastrophe to a sister ship as a thing of no importance.

[*Nitrate Producers Steamship Co.* v. *Shortt Brothers* (3) was also referred to as to the date from which interest should run.]

The House took time for consideration.

1923. Nov. 23. VISCOUNT HALDANE. My Lords, in the opinion which I am about to deliver, my noble and learned friend Lord Birkenhead desires me to say that he concurs.

The mixed question of fact and law that arises in this appeal is one which necessitates close examination. Only after modifying my own view from time to time as the

(1) [1915] A. C. 705, 713, per Viscount Haldane.

(2) (1907) 12 Com. Cas. 270.

(3) (1922) 38 Times L. R. 747.

arguments at the Bar proceeded, and after subsequently re-studying the whole of the evidence and the judgments in the Courts below, have I arrived at the conclusion that the Lord Ordinary and Lord Sands were right, and that the judgment of the majority in the First Division cannot stand.

Having regard to the concurrence of findings on what is an issue of fact, I think that we are bound to hold that it was established by the respondents that when the *Clan Gordon* left New York she was physically seaworthy. But it appears to me to be not less clearly shown that she was thus seaworthy only on the footing of having two out of six of her ballast tanks filled, to the extent of containing 290 tons of water. Without this amount of water in the tanks she was not, having regard to her loading, seaworthy, and the master in charge of her had to know this and observe the requirement through his voyage. He did not know it; he pumped out the water, and the ship heeled over and was lost two days after her commencement of the voyage. I think that the requirement as to this ballasting was due to the construction of this steamer as a turret vessel. Only scientific calculation could show the absolute character of a requirement which if not observed would render the ship unseaworthy. The master had not been instructed as to its special significance in the case of a turret ship like the *Clan Gordon*. He could not divine it, nor could the ordinary experience of a master not informed of the special peril due to abnormal construction be relied on to disclose it. The master did not know the unusual risk he was called on to undertake. The fault of this absence of knowledge lay not with him but with the owners, whose duty it was to have instructed him that while the vessel was seaworthy it was only conditionally seaworthy. The breach of the condition was therefore an occurrence for which they were personally in fault.

In the light of what has been proved, the two tanks held just enough water to give the vessel the stability indicated in the builders' instructions. But it is significant that the master was not shown to have been specially warned that the presence of the water ballast was essential to the ship

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

Viscount Haldane.

as loaded, if its stability was to be preserved. The instructions of the builders showed that such ballasting was essential, and the master was not told about it. In his evidence Captain Maclean says that it was the first cargo of the kind that he had actually loaded himself, and that before he sailed he had intended to sail with his ballast tanks empty. This makes it not surprising that two days later he directed that the tanks should be pumped empty. He hoped to obtain thus more freeboard for his vessel. He says that he had got no instructions from his owners that, with a homogeneous cargo, he was on no account to pump out the ballast tanks. All he knew was that those in charge of turret ships were to be careful of them. But he knew nothing of the Doxford instructions. Had he been informed of them he says that he would have obeyed them. But the reason of the necessity for what they prescribed was not known to him. He had been in command of the *Clan Gordon* for some time previously, and had been employed on other turret ships, and had found no difficulty. The case with which he had to deal of a ship loaded just as this one was, however, new to him, and he appears to have somewhat over-estimated the proportion between the cargo in the lower holds and that between the decks. If he had known that there was not so much weight in the lower holds, it may be that he would not have emptied the tanks. Captain Maclean was admittedly a competent and experienced officer, and there had been no difficulty with turret ships excepting in the case of the *Clan Ranald*, when the disaster was due to the carelessness of another master. Captain Maclean simply did not imagine that he could be running a serious risk when he began to pump out the tanks at sea, and nothing in his experience of turret ships had pointed to there being such a risk as there actually was.

My Lords, no doubt the primary and immediate cause of the disaster which occurred to the *Clan Gordon* must be taken to be, not defect in the initial loading, but the pumping of the tanks out at sea just before the disaster happened. But then, if the Doxford instructions meant anything, they meant that such pumping must not take place. Whether its

effect would be to destroy general stability, or to enable the free water to cause a dangerous disturbance of stability by the rush to the sides of the half-empty tanks, does not matter. The instructions obviously implied not only that water must be kept in tanks that were filled but that it must not be withdrawn.

On this point at least the instructions do not seem to me to be ambiguous, and if they had been given to Captain Maclean, we must take it that he would have interpreted them properly and carried them out. There is no doubt that Doxfords sent them round as being suggested by their investigation of the circumstances which led to the overturning of the *Clan Ranald*. It may be that ordinary ships might have proved to be subject to some analogous peril, but not, so far as we can gather the views of Messrs. Doxford, to the same extent. Mr. Holey, their assistant chief draughtsman, says in his evidence that the document, a copy of which was sent out for each turret ship, was meant to prescribe what was to be provided when loading. It is difficult to draw any other conclusion than that Doxfords thought there were risks in the case of turret ships, as to which special guidance for masters was required. It is true that the instructions were prepared and sent out by the builders, not only long after the ship was built, but many years before the accident, and that they are open to some criticism of the calculations on which they are founded. But the substance which underlies what they prescribe remains. They suggest to instructed persons that, as in the case of a turret ship there is danger of righting force diminishing more rapidly than in the instance of a wall-sided ship, it is necessary to provide an appropriate amount of special ballast. This seems to follow from the proposition that the ship is not to be loaded down to her marks with a homogeneous cargo without water or other adequate ballast. In so far as this is scientifically true, no amount of fortunate experience in the course of which the peril happens not to have matured can properly be set against it.

Under these circumstances, and with the builders' warning

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

Viscount Haldane.

in their hands, was it the duty of the owners to inform the masters of their turret ships of the special risk to which the turret form gave rise? I think that it was. On the mere experience and skill of the individual master, they could not safely rely. He might never have given thought to any unusual critical point as possible in the stability of his ship, or have been in circumstances from which he could derive the necessary experience. The deduction of the critical point was, as I have said, the outcome of scientific calculation, rather than of practice. But that circumstance did not render it the less important, or justify people in thinking that it was of such a nature that it could be left to be divined by those who had not been specially instructed.

My Lords, I think that the true conclusion as to this case is that expressed in a passage near the end of Lord Sands' dissenting judgment in the First Division. "The broad view of the matter appears to me to be this: A vessel of a peculiar type was lost under circumstances not satisfactorily explained. This led the builders to issue certain instructions in regard to the loading of such vessels. If these instructions had been observed the *Clan Gordon* would not have been lost. The defenders took no steps to bring these instructions to the knowledge of the master of the *Clan Gordon*." I see no sufficient answer to the reasoning either of Lord Hunter, the Lord Ordinary, or of Lord Sands. Not the less it is hardly admissible to come to this result easily without careful consideration of the judgments of the majority in the First Division. For I have rarely read judicial opinions on a technical question which impressed me more by their care in expression than those of the majority as well as of the minority in the Courts below. The Lord President holds that the builders' instructions were fallacious in that even if the cargo was so far from being homogeneous that the ratio of the density of what was between decks to what was in the lower holds was only 83 per cent., somewhere near 500 tons of water was required in the ballast tanks to give stability. This he thinks to be out of the question, inasmuch as the ship was shown to be actually stable with only 290 tons

of water in the tanks. He attributes this error, he suggests, to defective calculation by Doxfords about the cargo. But he goes on to say that even if this be so it is not wholly fatal to the pursuers' case, inasmuch as the master admitted that if the owners had communicated to him Doxfords' instructions he would not have pumped out the 290 tons after leaving port, whatever he might have thought about the necessity of these instructions.

I am not satisfied that all the criticisms on calculation of the cargo made by the Lord President were wholly well founded. But even if they were I think he has himself given the answer to them. For it is not in serious dispute that the vessel was defective in righting power and, therefore, unseaworthy when loaded unballasted down to her marks with a homogeneous cargo. The criticism of the Lord President does not affect this proposition. It may be that the wash over of the water in the half emptied tanks contributed to and accelerated the turning over of the vessel. But if the master had been told that she was unstable without 290 tons of water ballast he would not have begun to pump out the tanks. It is no answer to say that the *Clan Gordon* and other steamers of the same turret construction had previously made successful voyages without any water ballast. That may have been their good fortune. But it does not prove that to make such voyages without special ballast was safe. Careful scientific calculation has, in my opinion, demonstrated conclusively that it was not, having regard to the restriction on righting force in the case of a turret ship, and the tendency of the righting force to diminish rapidly after a point has been reached which is only reached substantially later in the case of a wall-sided vessel. The Lord President thinks that the danger to the ship was one which neither arose from a latent peril in her construction, as in the case of *The Schwan* (1), nor from anything lying beyond the scope of competent seamanlike skill. He is, therefore, of opinion that if there was blame for the accident it is the master and not the owners who are made responsible for it under the charterparty

(1) [1908] P. 356; [1909] P. 93.

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

Viscount Haldane.

and the bills of lading and the Harter Act. But surely, in this case, specific danger had been established as being a special and exceptional one by the calculation by the builders. The owners ought to have known of this, and it is obvious that the master might well not have. Even experienced navigators seem not to have come to suspect it in the course of their voyages in these turret ships. Captain Maclean suspected danger so little that if left to himself, he tells us that he would have pumped out his tanks before leaving New York. The instructions from Doxfords' office, of which he knew nothing, were, as Barr, the managing director of the respondents, says, a surprise to the respondents themselves, who appear not to have taken them seriously, or to have made any independent attempt at the time to see whether they were or were not well founded. And yet her righting power depends largely on the shape of a vessel, and is a matter which can only be accurately ascertained by highly technical and highly scientific study. I am, therefore, unable to agree with the Lord President when he says that it would be detrimental to security at sea to put on owners who have appointed a competent master a duty to give him instructions even in such special circumstances. Unless this is done the most competent master may not be aware of risks of which only exact knowledge, extending beyond any which he can be assumed to possess, can inform him.

My Lords, the reasons just given leave open, even assuming the view which I have expressed to be true, yet another point urged on their behalf by the defenders. They argue that as the instructions from the builders were, when received, passed on to Mr. Lyall, the defenders' engineer, now dead, this relieves them from responsibility. For Lyall was their servant and as such responsible to them for all structural matters, and for giving instructions to the masters of their ships. If this be so they contend that their liability cannot extend to the full sum of 97,892*l.* 17*s.* 7*d.* awarded to the pursuers by the Lord Ordinary, but is limited to 27,581*l.* 0*s.* 9*d.*, being the amount calculated on the footing of a liability of 8*l.* for each ton of the ship's tonnage. This contention

they base on s. 503 of the Merchant Shipping Act, 1894 (as amended by s. 69 of the Merchant Shipping Act, 1906), which limits the liability where the damage has been occasioned without the actual fault or privity of the owner. It is now well settled that those who plead the section as a defence must discharge the burden of proving that they come within its terms. That is to say, they must show that they were themselves in no way in fault or privy to what occurred; in this case, to the failure to render the ship properly seaworthy, by taking care that the master was instructed about the special risk arising from its shape. Now, even on the assumption that the late Mr. Lyall was fully directed to instruct the master on this point, and that the failure to do so was his fault, the owners are surely not discharged from responsibility. For their personal duty was to provide a seaworthy ship, and the ship was not seaworthy if the master was not instructed on the special matter in question. That they left their duty to be discharged by Lyall, as their servant or agent, therefore does not relieve the owners of blame. Their responsibility as regards seaworthiness was an individual one of which they could not divest themselves, and when they left its discharge to Lyall they did so at their own risk. I am well aware of the magnitude and seriousness of the consequences of this conclusion to the respondents, but I am unable to see how what they did divested their breach of duty of these consequences. I therefore think that the interlocutor of the Lord Ordinary should be restored, and that the respondents must pay the costs here and in the Inner House. As to the point made by Mr. Macmillan about expenses, it is true that the pursuers failed technically in the part of their case which related to physical seaworthiness in New York Harbour. But the evidence they led on this point was not easily severable from the evidence required on the broader issue on which they succeeded. Accordingly, I do not think that we ought to interfere with the exercise made of his discretion by the Lord Ordinary in giving the pursuers the whole of their expenses.

My Lords, the appeal was admirably argued on both sides,

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

Viscount Haldane.

and I wish, before sitting down, again to state the broad reasons which have made me finally feel myself compelled to prefer the argument of the appellants.

These reasons are as follows. The vessel was unseaworthy in that she could not safely undertake a voyage with a cargo of an approximately homogeneous character unless she had and retained at least 290 tons of water in her lower tanks. That this was her indisputable condition for safety is not the less true because she, and vessels resembling her in shape and construction, had successfully made a certain number of voyages with a full cargo, and without this minimum ballast required. To be put about under a rapid action of the helm is what in the case of every vessel that undertakes a long voyage may be necessary, and in the case before us, the operation is proved to have been a dangerous one for a turret ship, without sufficient ballast. The inherent danger was one which a master not specially instructed might well overlook. Even a long experience might chance not to reveal it. It was a danger, however, which scientific calculation could reveal, calculation of a kind which no ordinary master, however long his experience at sea, could be reckoned on as having either made or as having been able to make. Thus it was the duty of the owners, whose business in making their ship seaworthy was to have the master instructed as to all defects in seaworthiness during the voyage arising from inherent causes that were not obvious, and of which his merely practical knowledge could not be relied on to inform him. This the owners in the case before us failed to do, when they did not bring to the mind of the master of a turret ship the Doxford special instructions. These instructions may be open to criticism in detail, though I think that the Lord President attaches more importance than is due to the effect on their substantial validity of the points he made. But, as the Lord President himself concedes, they show that it was unsafe to get rid of the water ballast after the ship had started. Speaking broadly, Doxfords' investigation had shown the reason for such unsafeness, and its direct relation to the shape of the ship. The investigation was of a technical

character. The master could not himself be expected to make an investigation leading to a calculated result like this, or to learn for himself what was implied merely in the course of ordinary experience. I differ at this point from what I understand the Lord President to suggest, and I draw the inference that the ship was inherently unseaworthy in certain not improbable conditions unless special precautions were taken which it was the duty of the owners to enjoin, as being required by the structure of their ship.

I am therefore of opinion that the appeal must be allowed.

LORD ATKINSON. My Lords, it having been admitted that the *Clan Gordon* was not, by reason of want of stability, unseaworthy when she left New York Harbour, the main questions for decision in this appeal are whether the neglect of her owners to communicate to the master the contents of the document, No. 141 in process, rendered him incompetent to navigate his ship laden as she was, and therefore rendered that ship unseaworthy, and whether the owners had exercised due diligence to make the ship seaworthy. The appellants filed the following pleas in law :—

"1. The defenders, having failed to carry and deliver the pursuers' said cargo in terms of their contract, are liable in damages.

" 2. The sum sued for being the loss to the pursuers caused by the said breach of contract, decree should be pronounced in terms of the conclusions of the summons.

" 3. The *Clan Gordon* having been sent to sea in an unseaworthy condition, and the pursuers having thereby suffered loss and damage as condescended on, the pursuers are entitled to decree on the terms of the conclusions of the summons.

" 4. The *Clan Gordon* having been lost for a cause for which the defenders are liable under the contract condescended on, the pursuers are entitled to a decree in terms of the conclusions of the summons.

" 5. The defenders having failed to exercise due diligence to make the *Clan Gordon* seaworthy, and the pursuers having

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

Lord Atkinson.

suffered loss and damage through this unseaworthiness as condescended on, the pursuers are entitled to decree in terms of the conclusions of the summons."

The first and second of these pleas rest upon the breach by the respondents of the contract contained in the bills of lading, to deliver at the ports of Dalny or Taku Bar the goods shipped on the *Clan Gordon* to the order of the appellants or their assigns. This breach of contract admittedly took place. The burden rests upon the respondents to show that they are not responsible for it.

By the charterparty it is provided, amongst other things, that the vessel, i.e., the *Clan Gordon*, was tight, staunch, strong and in every way fitted for the voyage, including proper ballast and dunnage, and should receive on board for the voyage a full cargo of refined petroleum in customary low top cases of ten American gallons each, which the charterers (i.e., the appellants) were to provide and furnish. By the 21st clause of this charterparty it is expressly provided that it is subject to all the terms and provisions of, and all exemptions from liability contained in, the American statute known as the Harter Act, and that bills of lading shall be issued in conformity with that Act. And accordingly the bills of lading provided that the shipment was subject to all the terms and provisions of, and to all the exemptions from, liability contained in the Act of Congress of the United States relating to Navigation approved on May 13, 1893—i.e., the Harter Act.

The relevant provisions of the Harter Act are contained in its third section, which runs thus: "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel. . . ."

In addition to the provisions thus imported into the bills

of lading, each of the latter (three in number) contained a clause the relevant portions of which run as follows: "It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by fire from any cause wheresoever occurring; by barratry of the master or crew, by enemies, pirates or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labour; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager)."

It will be observed that under the Harter Act it is the absence on the part of the owners of due diligence to make their vessel seaworthy which deprives them of protection, whereas under the clause in the bills of lading it is the omission of the owners of the ship or any of them, or of the ship's husband or manager of the like kind, to exercise due diligence which deprives the owners of the named protection.

I fancied it was suggested by Mr. Macmillan in the clear, ingenious and able argument which he addressed to the House that it was the duty of the first officer of a ship exclusively, to superintend the stowage of her cargo, and that the master was altogether relieved of that duty by this officer. I do not think that that is quite so.

In *Anglo-African Co.* v. *Lamzed* (1) Willes J. said: "The master (i.e., the master of the ship) is by law required to be a competent stevedore himself." And in Carver on Carriage by Sea, 4th ed., it is, in para. 48, laid down on the authority of *Hayn* v. *Culliford* (2) that it is the prima facie duty of the master to stow safely the goods carried in his ship. I observe that on p. 1 of the respondents' case it is stated: "At the

(1) (1866) L. R. 1 C. P. 226, 229.
(2) (1878) 3 C. P. D. 410, 416; (C. A.) 4 C. P. D. 182.

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

Lord Atkinson.

time when she " (the *Clan Gordon*) " sailed, two of her ballast tanks, Nos. 1 and 2, containing 95 and 195 tons of water respectively, were full. She was loaded down to her marks."

It may, of course, well be that in any given case the responsibility for the proper stowage of the cargo of a vessel is, by the agreement of the shipper and shipowner, thrown upon some person or persons other than the master, such as stevedores. But even if such an arrangement be made, though it may relieve the master from attending to, or being responsible for, the actual operation of stowing the cargo, it by no means follows that he is relieved from the duty of accurately ascertaining what is the result of the completed work of stowage upon the stability of his ship, such as the relative weights of the portions of the cargo stowed in the hold and stowed atween decks.

It is set forth in the respondents' case that the *Clan Gordon* had a deadweight carrying capacity of 5675 tons, that she was a turret ship, a class of vessel differing from wall-side steamers in the configuration of their sides, that Messrs. Doxford & Sons, shipbuilders, of Sunderland, had built nearly 200 of these ships, that they were good sea boats, of better sea-going capacity, and rolling less heavily than wall-sided ships, due to the fact that, owing to their configuration, less weight was carried in the upper part of the ship relatively to the lower than in wall-sided ships. But another result of their configuration was that while up to 18 degrees of inclination or heel they possessed a greater power of righting themselves than did the wall-sided ships, yet beyond that angle of inclination they possessed much less power of righting themselves than did the others. It is not disputed that before leaving New York on July 28, 1919, the goods mentioned in the bills of lading had, with a number of tons of bunker coal, been loaded on the *Clan Gordon*, and that the cargo so loaded was so stowed that the contents of the 'tween decks represented a density of 95 or thereabouts, as against a density of 100 represented by the contents of the lower holds and bunkers.

The captain in his evidence (at p. 5) says that the cargo

actually loaded was the first of its kind he had ever loaded himself, that after the pilot left him he tried on his ship the test for stability he had frequently tried from 1917 downwards. The test consisted in this—that when going full speed (ten knots) he would have the ship's helm put hard over both ways; that if the ship should be tender she would take a list. The *Clan Gordon* showed, he says, no sign whatever of tenderness under the test; the sea was, he says, more or less calm. He then adds: "I had my 290 tons of water ballast on board. Tanks Nos. 1 and 2 were full." A not unnatural conclusion to draw from this evidence is that if those tanks had been kept full, his ship would not have been lost as she was lost.

A list of voyages made by the *Clan Gordon* and by other ships with homogeneous cargoes from March, 1909, to December, 1915, was given in evidence, and apparently relied upon by the respondents to establish that this ship might, though heavily laden, have been safely navigated with empty ballast tanks. In the fifteen voyages mentioned in this list only four appear to have been made with empty tanks. Besides, it is not the respondents' case that the master was acting rightly in this case in emptying his ballast tanks after leaving New York. On the contrary, in their case, p. 5, it is stated that it is not disputed that the immediate cause of the loss of the *Clan Gordon* was the pumping out of the water from the two ballast tanks. Neither is it disputed that the captain, in giving the order to pump those tanks, committed an error in the management of his vessel. There is not a particle of evidence to show that Master Maclean ever sailed this vessel with empty water tanks, or that he applied to his ship the test he so much relied upon when all her ballast tanks were empty. He seems to have concluded that because the vessel showed no tenderness and was safe when her two ballast tanks were full, she would also show no tenderness and be safe when they were empty. The sequel shows how fatal was his error in this respect, and it would appear to me to show too how much he needed instruction on this question of the stability of his ship when loaded with

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

Lord Atkinson.

a homogeneous cargo, or a cargo closely approaching to a homogeneous one.

His description of what happened would appear to enforce this last conclusion. He says that after tank No. 1 had been emptied and No. 2 emptied, all but six inches, the ship took a list of about 5 degrees to port. He was then steering on a course south-west true making ten knots; that about 4.30 he wanted to get bearings and ordered the quartermaster to port his helm; that the latter began to do so, a little at first; that nothing happened immediately; that he then ordered the quartermaster to put the helm hard aport; that then she began to list; at first she went over 14 degrees and then fell right over 60 or 70 degrees; that this happened very quickly. The ship then sank; that before she sank he saw her turn with her keel up. The sea was calm.

There is nothing to show that what actually occurred would not appear to a competent seaman, properly instructed, to be the thing which would most probably occur under the circumstances. The evidence, I think, establishes that the master's handling of his ship amounted to gross and flagrant mismanagement for which there was no excuse. Though this be so, the main question still remains. Did the default of the master in this respect result from want of due—i.e., reasonable—diligence on the part of the owners of this ship, or any of them, or of the ship's husband or manager in not having the advice and instruction contained in document No. 141 in process brought home to the mind and knowledge of Captain Maclean before they entrusted him with the navigation of this ship on her voyage from New York to the Eastern ports named in the charterparty with the cargo mentioned?

It is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency of the master who commands her. Does not that principle apply where the master's inefficiency consists, whatever his general efficiency may be, in his ignorance as to how his ship may, owing to the peculiarities of her structure, behave in circumstances likely to be met with on an ordinary ocean voyage? There cannot be

any difference in principle, I think, between disabling want of skill and disabling want of knowledge. Each equally renders the master unfit and unqualified to command, and therefore makes the ship he commands unseaworthy. And the owner who withholds from the master the necessary information should, in all reason, be as responsible for the result of the master's ignorance as if he deprived the latter of the general skill and efficiency he presumably possessed.

The vital necessity, the appellants contend, was to get the contents of this document No. 141 in process into the heads of the captains of turret ships. The mode or method in or by which that could be effected is quite immaterial. It is the effect of the acquired knowledge on the master's management of his ship that is the matter of importance, since the master would by the instructions be warned against a somewhat undiscoverable or hidden danger, which, if unknown or disregarded, might lead to lamentable results. It is essential to consider the history of this document No. 141 in process. The tragedy from which it sprang, the disasters it aimed at preventing, the persons by whom it was framed, as well as those to whom it was distributed, are all important. In the year 1909 a ship named the *Clan Ranald*, a sister ship of the *Clan Gordon*, built by the same builders and belonging to the same owners, the respondents, while on a voyage from Australia to South Africa laden with flour and grain, overturned and sank in fine weather very much as did the *Clan Gordon*. Forty men were drowned, including the master, chief engineer, second, third and fourth engineers, second mate and chief steward. A public Court of Inquiry was held at Adelaide, Australia, under the Merchant Shipping Act of 1894, into the circumstances attending the loss of the ship. The report made by this Court was given in evidence. It is a very significant document. The finding of the Court as set forth in it is to the effect that the *Clan Ranald* at the time of her departure at 7 A.M. on January 31 laden with grain and flour had a list to starboard of 4 degrees. That on reaching the open sea this list increased to 6 degrees; that about 2 P.M. the vessel heeled to starboard, placing the side

H. L. (Sc.) 1923 STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD. Lord Atkinson.

of her turret deck under water; that she never righted again, yet she continued on her course firing rockets (of distress presumably); that the helm was starboarded with a view to correct the list, but without effect; that at 5 P.M. the helm was put hard aport, but she still maintained her dangerous angle of inclination, and at 10 P.M. sank out of sight. It was also proved that her ballast tanks had been pumped dry before she left the port of Adelaide. It was further found that this ship when lost was practically a full ship, having approximately 6500 tons of cargo on board, and in addition 70 tons of coal on her turret deck, 50 on the starboard side, 20 on the port side, and about 50 on each side of the fiddle deck. There was no finding that the cargo had shifted, nor was there any finding that the cargo had been badly loaded or stowed. This latter fact is very important considering the extraordinary evidence given at the trial of this case by Mr. Thos. Barr, the secretary and a director of the respondents.

Well, this disaster obviously affected vitally the pecuniary interests both of the builders, who were very extensive, if not the most extensive builders of these turret ships, but also of the respondents, who were possibly the largest owners of them. Both naturally and properly desired to prevent by all reasonable precautions the recurrence of such a misfortune, and accordingly they turned their respective attentions to the best mode and method of loading these turret ships under certain possible conditions so as to secure their stability. They accordingly determined to compile general instructions for the loading of the turret ships. Experiments and calculations were made to get material for this compilation. Mr. J. T. Holey, the assistant chief draughtsman of the builders, filled in the forms ultimately adopted. He stated that the object of preparing these was the guidance of masters of these vessels. The compilation is No. 141 in process. It is headed: "General Instructions as to loading Turret Ships issued by Messrs. William Doxford & Sons, Ld., Sunderland." Copies of this document the witness Holey says were sent to all the British owners of turret ships —a copy for each ship. In particular, he says, a copy was

sent to the owners of the *Clan Gordon*. He believes some of the owners asked for extra copies. He did not think that any owner ever wrote to say that he did not understand them. [His Lordship then examined in detail the evidence of Mr. Barr, the secretary of the respondent company, Captain Ruthven, Captain Maclean, and Captain McIntosh with reference to the nature and effect of these instructions, and he continued as follows :]

After a most careful perusal of all the evidence I have come to the conclusion that the respondents have failed to establish that the instructions contained in No. 141 in process were either obsolete, unintelligible, or useless. I think that, on the contrary, even to masters of turret ships of general capacity as seamen, they were very helpful towards the safe navigation of those ships under conditions which frequently exist, by directing attention to the dangers which might arise from unskilful loading, and indicating how those dangers might be avoided.

I think that the respondents by leaving the captain of the *Clan Gordon* in ignorance of these instructions, by failing to bring them to his notice so that he would grasp and understand them, failed to discharge the duty they owed to the shippers of the cargo the vessel carried, and failed to use due diligence to make their ship seaworthy. The fact, if it be a fact, that few disasters befell the fleet of the respondents in the interval between the loss of the *Clan Ranald* and that of the *Clan Gordon* is no proof that these instructions were useless, or were disregarded or were not helpful. It is quite as rational, indeed more rational, to conclude that this fortunate immunity was due to the observance of these instructions rather than to the disregard of them. It follows from what I have said that, in my view, the loss of the *Clan Gordon* did not take place without the fault or privity of the respondents within the meaning of s. 503 of the Merchant Shipping Act of 1894. On the whole, I think the appeal succeeds, that the decision appealed from was erroneous and should be reversed, and that the appeal should be allowed, and I agree with the motion proposed.

H. L. (Sc.)
1923
STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

LORD PARMOOR. My Lords, the appellants are a company incorporated under the laws of the United States of America, carrying on business in New York and elsewhere as oil merchants. The respondents have their registered office in Glasgow, and are owners of the steamship *Clan Gordon*, a turret steamer built of steel in 1900, and of the burden of 2292·45 tons register. In July, 1919, the steamship *Clan Gordon* loaded at the port of New York a cargo of motor spirit, and of refined petroleum in cases, and of refined wax in bags, to be delivered at Dalny and/or Taku Bar to the order of the appellants or their assigns. The steamship *Clan Gordon* sailed from New York on July 28, 1919. On July 30, 1919, she listed to port, turned turtle in a calm sea, and was totally lost with her whole cargo.

The appellants brought an action for loss and damage, pleading in law that the respondents, having failed to carry and deliver the cargo in terms of their contract, were liable in damages. It was alleged that the steamship *Clan Gordon* had been sent to sea in an unseaworthy condition, and that the defendants had failed to exercise due diligence to make the steamship *Clan Gordon* in all respects seaworthy. At the hearing the appellants endeavoured to prove that the steamship *Clan Gordon* was not structurally seaworthy when she left New York. Both the Lord Ordinary, Lord Hunter, and the judges of the First Division have found that the steamship *Clan Gordon* was structurally seaworthy when she left New York, being tight, staunch, and strong, and well equipped for the carriage of her cargo, and in a condition to encounter whatever perils a ship of that character and burden may be fairly expected to encounter on the voyage for which she is destined. The finding of the Lord Ordinary, and of the judges of the First Division, on this issue, was not questioned, on the hearing of the appeal before their Lordships.

The question to be decided on appeal is whether the respondents committed a breach of duty for which they are liable, in not communicating to the captain of the steamship *Clan Gordon* certain information which they possessed and which related to turret vessels of the *Clan Gordon* type. The

Lord Ordinary found in favour of the appellants, but his interlocutor was recalled by the judges of the First Division. Lord Sands dissented, and was of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

A further question is raised as to the quantum of damages. The respondents claim that, if there is any liability, they are entitled, in terms of s. 503 of the Merchant Shipping Act, 1894, to have their liability limited to 8*l*. of each ton of the ship's tonnage.

The steamship *Clan Gordon* was built for the respondents by Messrs. William Doxford & Sons, shipbuilders, Sunderland. She belonged to a class of turret steamers, of which, at one time, the respondents had no less than twenty-nine in their fleet. Turret vessels, up to a certain angle of inclination, or list, possess a greater stability and power of righting themselves than wall-sided vessels; but if this angle of inclination, or list, is exceeded, then, owing to the shape of a turret steamer, the centre of buoyancy is shifted, and there is a greater risk that the vessel may turn turtle. Captain Maclean, who was master of the steamship *Clan Gordon*, on the voyage in question, was, as regards skill in seamanship, a competent master, but the appellants maintain that the ship was not well manned on the voyage in question, in that Captain Maclean was not furnished with, and had not had brought to his notice, a document of general instructions as to loading of turret ships issued by the builders, Messrs. William Doxford & Sons, of Sunderland, and headed, SS. *Clan Gordon*, "General instructions as to loading."

The first instruction is that this vessel is not intended to load down to her marks, with a homogeneous cargo, without water ballast. A homogeneous cargo, in this context, denotes a cargo of approximately the same density throughout, and of quantity sufficient to reasonably fill the whole cargo space. I agree in the conclusion of the Lord Ordinary and Lord Sands, that the cargo on the steamship *Clan Gordon* was, in substance, a homogeneous cargo within the meaning of this instruction.

When the steamship *Clan Gordon* was loaded in New York

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

Lord Parmoor.

two of her ballast water tanks were filled, holding an aggregate amount of 290 tons. After leaving New York the captain determined that he would pump out the water ballast from both tanks. The actual pumping began on the 30th. At noon it was reported that one tank was empty, and the second tank was then started. At 4 o'clock it was reported that the second tank only contained six inches of water on the port side. At about 4.30 an order was given to put the helm hard-aport, and the steamship *Clan Gordon* began to list, subsequently falling right over, and sinking in the open sea. The question is whether there was any duty upon the respondents in the exercise of due diligence in their business as shipowners to bring these general instructions to the notice of Captain Maclean. By the terms of the contract of carriage, it was agreed that the respondents should not be liable for "loss or damage occasioned by causes beyond their control by perils of the sea . . . . collisions, stranding or other accidents of navigation, not resulting from want of due diligence by the owners." In addition, the provisions of s. 3 of the Harter Act applied: "that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel." In substance, the same considerations arise under the clause in the bill of lading, and under the above section of the Harter Act. If therefore the loss, of which the appellants complain, resulted from want of due diligence on the part of the respondents as owners of the ship, the respondents are under obligations, as carriers, either to deliver the goods shipped on the steamship *Clan Gordon*, or to pay damages for loss.

In considering whether, under these circumstances, the respondents committed a breach of duty, I think that the tests stated by Lord Gorell in the case of *Abram Lyle & Sons*

v. *Owners of the Steamship Schwan* (1) are applicable, although they refer to conditions of an entirely different character. In that case the *Schwan* was held not to be seaworthy owing to the defect in a three-way cock, and that the shipowners were liable as their agent had not exercised reasonable care and diligence within the meaning of the second clause of the bill of lading. There was no evidence that the chief engineer or any of his subordinates had been warned about the danger, or knew anything of the peculiar construction of the cock, and if the cock had been of a proper and usual character there would have been no danger in its use. Lord Gorell says, in his judgment: "The question thus seems to be: is a vessel seaworthy which is fitted with an unusual and dangerous fitting, which will permit of water passing from the sea into her holds unless special care is used, and those who have to use the fitting, in the ordinary course of navigation, have no intimation or knowledge of its unusual and dangerous character, or for the need of the exercise of special care, and might, as engineers of the ship, reasonably assume and act upon the assumption that the fitting was of the ordinary and proper character, which would not permit of water so passing, however the fitting was used? I think this question should be answered in the negative." In the case under appeal I am unable to come to any other conclusion than that a vessel, which requires special precautions of an unusual character to be taken in the maintenance of a sufficient water ballast to ensure conditions of stability which would not be known to a captain of ordinary skill and experience, and which have not been brought to his notice, although they had been specifically indicated to the shipowners in instructions sent to them from the shipbuilders, is not manned so as to be seaworthy, and that there was a duty on the respondents to have brought such instructions to the notice of the captain.

The relevant considerations may be summarized in the following order:—

(1.) The steamship *Clan Gordon*, when she sailed from

(1) [1909] A. C. 462.

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

Lord Parmoor.

New York, was approximately loaded down to her marks with a homogeneous cargo, so that any competent captain, to whom the general instructions issued by Messrs. William Doxford & Sons had been communicated, would have known that the first paragraph applied to the conditions of loading in the steamship *Clan Gordon*.

(2.) That the steamship *Clan Gordon* as loaded, when sailing from New York, was not seaworthy without water ballast, and that it was in consequence of the pumping out of the water ballast that she failed to right herself, and sank on a fair day, in a calm sea.

(3.) That the margin of stability in a turret ship of the construction of the steamship *Clan Gordon* is ascertainable by exact calculation, and that the respondents, by means of the general instructions issued by Messrs. Doxford & Sons, knew that the margin of stability had been ascertained and that the *Clan Gordon* was not seaworthy, as loaded, without water ballast.

(4.) That the information conveyed to the respondents in para. (1.) of the general instructions, had not been brought to the notice of the captain of the steamship *Clan Gordon* at the time she sailed from New York. This information was not a matter within his knowledge, although it is admitted that he had all ordinary knowledge in seamanship which a competent skilled seaman should possess.

(5.) That if the information contained in para. (1.) of the general instructions had been communicated to the captain of the steamship *Clan Gordon* he would not have pumped out the water ballast, and the vessel would not have sunk.

The captain, in giving evidence, at the inquiry before the Board of Trade in 1920, was asked, "If you had these instructions before you, don't you think you would have refrained from pumping out those two water ballast tanks at sea?" He answered: "Yes, I would have refrained from pumping out those two water ballast tanks, at any rate until I had worked all my coal off 'tween decks." It is true that he qualified this answer on the following day, on the ground that he would not have taken much notice of

these instructions, because they are entirely contrary to other experience of those turret ships; but it is difficult to appreciate how such experience could have been gained when the result of an experiment would necessarily be disastrous. The captain was further asked: "Why did the steamship *Clan Gordon* turn turtle?" and answered: "I presume she turned turtle because the tanks were pumped out."

The above considerations are, in my opinion, amply sufficient to establish a prima facie case that there was a duty on the respondents to communicate the instructions to the captain of the steamship *Clan Gordon*. The question, therefore, arises whether sufficient explanation has been given by the respondents to justify them in their negative action. Mr. Barr, who had been registered manager for the respondents since the steamship *Clan Gordon* was built in June, 1900, expresses quite frankly the reasons which influenced the respondents in not communicating the instructions to their captains, including the captain of the steamship *Clan Gordon*. He states that when the respondents get vessels, they consider that they get their vessels sufficiently stable to carry homogeneous cargo, without water ballast. This general statement may be accepted, but it emphasizes the duty to communicate a special instruction, which indicated that a vessel of the *Clan Gordon* type was not sufficiently stable to carry homogeneous cargo without water ballast. He further states that an instruction of this kind is so utterly against all experience of the steamers which the respondents had, that it would certainly not appeal to them as a document which would be of any use to them, or as a serious document, a document they need take serious notice of. No doubt this explanation must be taken in reference to the special circumstances, but I think it was an additional reason for giving weight to the instructions that they were of such a special nature as to be entirely against all former experience.

Mr. Macmillan, in his able argument on behalf of the respondents, supported the judgment of the First Division on the following grounds. He said that the case presented

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

Lord Parmoor.

facts of an unprecedented character, and that there was no instance in the books of the owner of a ship being held liable for not bringing the instructions of the builders, relating to the stability of the ship, to the notice of the captain. This may be admitted; but the question, nevertheless, arises, whether the facts as disclosed in the present appeal do not disclose a danger of an unusual character known to the respondents, which it was their duty to bring to the notice of the captain of the steamship *Clan Gordon*. For reasons already stated, I think that it was the duty of the respondents to bring the instructions to the notice of the captain. Mr. Macmillan further argued that the conditions of stability in a turret vessel could not be regarded as constituting an unusual danger, in that such a vessel was one of a substantial class of vessels, of which the merits and demerits were known, and of which the respondents had had a prolonged experience, both before and after the loss of the steamship *Clan Ranald*, a ship of similar construction which had turned turtle and sunk in 1910. Among other passages, he referred to the evidence of Captain Ruthven, who was called at the trial on behalf of the appellants. He was asked: "Would you, if you had been in command of this ship when she was two days out from New York, have emptied numbers 1 and 2 tanks?" His answer is: "I certainly would not have done that, if I had had those instructions I should have filled another one. If I had been long enough on the ship, I might have found out for myself what I found out from the builders." It was said that as the captain of the steamship *Clan Gordon* had been in charge of the vessel for more than a year, he might have found out for himself the information contained in the instructions, and that it was more safe to rely on the experience of the captain than to fetter him by issuing special instructions. The fact that the captain of a vessel may find out for himself, after a certain period of time, a source of unusual danger, which was within the knowledge of the shipowners, and might have been communicated directly to him in the first instance, is not sufficient to justify the shipowners in subjecting a cargo to the risk of loss, or to

exempt them from liability for not exercising due diligence if such a loss has been incurred. Evidence of a similar character was given by Thomas Barr, who had been the registered manager of the respondents since the steamship *Clan Gordon* was built in June, 1900. He states as follows: "Well, the builders have not an actual experience of the vessel, and how their figures are arrived at we do not know. We do know that our masters and ourselves have the practical experience of the conditions under which these vessels are sailing, and we are rather inclined to take it that the experience which we have of these types put us in a position of being better able to judge whether the ships could carry these cargoes or not." It is not possible to accept evidence of this character as an answer to the allegation that instructions, based on exact calculations of the stability of the vessel and the accuracy of which is not questioned, had not been brought to the notice of the captain.

It was further suggested that the instructions were in themselves ambiguous, and more likely to cause difficulty than to give information which would assist the captain. Mr. Camps, a maritime expert, says that he did not have any difficulty in understanding the instructions, and that, if you take each paragraph by itself, he thinks that the first paragraph is perfectly clear. Evidence of a similar character is given by Captain Ruthven and Captain M'Intosh, and the three experts called for the respondents—Mr. Wall, Professor Welch, and Dr. Douglas—do not suggest that there is any difficulty in understanding the first paragraph of the instructions. In my opinion, the respondents have failed to establish that the instructions were in themselves of an ambiguous character, so that it was prudent not to embarrass their captains by bringing to their notice the information which they contained.

In the result I agree with the conclusions of the Lord Ordinary, and Lord Sands, that there was a duty on the respondents to bring the instructions to the notice of the captain of the steamship *Clan Gordon*, and that the respondents have failed to prove that they used due diligence. There is

H. L. (Sc.) 1923

STANDARD OIL COMPANY OF NEW YORK v. CLAN LINE STEAMERS, LD.

Lord Parmoor.

no doubt that if there was a duty on the respondents to bring the instructions to the notice of the captain the vessel was not seaworthy, and that the loss resulted from her unseaworthiness.

It was further argued on behalf of the respondents that they were entitled to have their liability limited in accordance with s. 503 of the Merchant Shipping Act of 1894, but in my opinion they have failed to show that the said loss occurred without their actual fault or privity.

The appeal should be allowed, and the judgment of the Lord Ordinary should be restored.

Interlocutor of the First Division of the Court of Session in Scotland reversed and interlocutor of the Lord Ordinary restored. Cause remitted back to the Court of Session with a direction to enter decree for the appellants for the sum of 97,892*l.* 17*s.* 7*d. with interest at the rate of* 5 *per cent. per annum from January* 13, 1922 (*the date of the interlocutor of the Lord Ordinary*), *and to do therein as shall be just and consistent with this judgment. The respondents to pay the costs of the action in the Court of Session, under reservation of the question of modification, if any, as well as before the Lord Ordinary, until the lodging of the Auditor's Report, and also the costs of the appeal to this House.*

Lords' Journals, Nov. 23, 1923.

Agents for the appellants: *William A. Crump & Son, for Maclay, Murray & Spens, Writers, Glasgow, and J. & J. Ross, W.S., Edinburgh.*

Agents for the respondents: *Coward, Hawksley, Sons & Chance, for Wright, Johnston & Mackenzie, Writers, Glasgow, and Webster, Will & Co., W.S., Edinburgh.*

[HOUSE OF LORDS.]

MOSS STEAMSHIP COMPANY, LIMITED Appellants;

AND

BOARD OF TRADE . . . . . Respondents.

H. L. (E.)*

1923

Nov. 23.

Shipping—Charterparty—Emergency Legislation—Voyage directed by Government—Interference with Charterers' Business—Claim for Compensation—Indemnity Act, 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 2, *sub-ss.* 1 (*b*), 2 (*iii.*) (*b*); *Schedule, Part II.*

By s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920, any person who has, otherwise than by requisition of a ship, "sustained any direct loss or damage by reason of interference with his . . . . business . . . . through the exercise . . . . during the war of any power under any enactment relating to the defence of the realm . . . . shall be entitled to payment or compensation in respect of such loss or damage."

By sub-s. 2 (iii.) (*b*), if the claimant would apart from the Act have no legal right to compensation, the compensation is to be assessed according to the principles set forth in Part II. of the Schedule to the Act.

By Part II. of the Schedule, "The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business. . . . ."

A shipping company, whose ordinary business it was to run a line of steamers to the Mediterranean, chartered a ship on a time charter for the purpose of its being employed on that business. The charterparty provided that if during the currency of the charter the ship was directed by the Government for some voyage the direction was to be for the charterers' account. During the currency of the charter the Government directed the ship to go on a voyage to Cuba. That voyage resulted in a loss to the charterers, who also lost the profits which they would have made if the ship had been used for the Mediterranean trade. The charterers claimed as compensation under the Act, first, a sum representing the net loss sustained by them as the result of the directed voyage, and, secondly, a sum representing the profit they would have made by the voyage intended to be made in the Mediterranean:—

Held (by Viscount Cave L.C., Viscount Haldane and Lord Sumner; Viscount Finlay and Lord Parmoor dissenting as to the second claim), that the claimants were not entitled to compensation under the Act; by Viscount Cave L.C. and Lord Sumner, because the directed voyage, assuming it to be an interference, was not a direct interference, with the claimant's business; by Viscount Haldane, because the loss was not directly caused by that interference.

Decision of the Court of Appeal [1923] 1 K. B. 447 affirmed.

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* *Present:* Viscount Cave L.C., Viscount Haldane, Viscount Finlay, Lord Sumner, and Lord Parmoor.

H. L. (E.) 1923

MOSS STEAMSHIP CO. v. BOARD OF TRADE.

APPEAL from an order of the Court of Appeal (1) reversing a decision of the War Compensation Court.

The following statement of facts is taken from the judgment of the Lord Chancellor :—

" The Appellants, the Moss Steamship Company, Ltd., are a British steamship company whose business it is to carry goods to and from the Mediterranean and the Black Sea. They have a number of vessels of their own, but in the summer of 1919 their fleet had been reduced by circumstances connected with the War; and on the 16th July, 1919, they chartered from the Adam Steamship Company, Ltd., the steamship *Aberlour* on a time charter for 15 months, the trading limits being defined as 'United Kingdom, Continent, Black Sea, Mediterranean trades, including Egypt to United States of America and United Kingdom, and/or other trades as per owner's warranties attached.' At that time the Shipping Controller had power under Regulation 39 B B B of the Defence of the Realm Regulations either to requisition a ship or to give directions as to her use in trade ; and under Regulation 39 D D no British ship could proceed to sea except under a licence granted by the Shipping Controller. It was no doubt in consequence of these regulations that the following clause was inserted at the request of the owners in the charter party :—

' 32. This charter party is subject to first voyage licence being obtained, but, if during the currency of this charter steamer is directed by the British Government, or in the event of licence being refused for voyages nominated by charterers from time to time for some voyage or voyages, this direction is to be for charterers' account and this charter party with all its conditions to remain in force between the Charterers and Owners. Should steamer be requisitioned by British Government this charter to be null and void.'

" The ' owner's warranties ' to which reference was made in connection with the trading limits included a warranty that the ship should comply so far as possible with the orders of His Majesty's Government as to sailings, routes and otherwise.

(1) [1923] 1 K. B. 447.

"Licences for the first voyage and for a second voyage to the Mediterranean were duly granted, and the vessel made these two voyages under the charter; but on the 15th December, 1919, the Shipping Controller, by a letter addressed to the owners of the *Aberlour*, directed them to offer her to the Royal Commission on Sugar Supplies for the carriage of a cargo of sugar from Cuba to the United Kingdom. The Appellants on being informed of this direction protested, stating that they had booked a full outward cargo for a third voyage to Egypt and expected to have a full return cargo from that country to the United Kingdom; but the Shipping Controller declined to alter his decision, and refused a licence for the projected third voyage. Ultimately under arrangements made by the owners of the vessel she carried a general cargo from Liverpool to the West Indies and brought back from Cuba a cargo of sugar. This voyage occupied 120 days and resulted in a net loss after debiting the charter hire of 14,758*l.* 16*s.* 10*d.*; and the owners under clause 32 of the charter party claimed and received this sum from the Appellants. The profit which the Appellants would have made if they had been allowed to use the ship in their Mediterranean trade during the 120 days has been found to be 6198*l.*

"The Appellants claimed payment of the above sums of 14,758*l.* and 6198*l.* under the Indemnity Act of 1920, on the ground that they were losses resulting from a direct interference by the Shipping Controller with their business, and on the claim being disputed took proceedings against the Shipping Controller in the War Compensation Court. That Court, by a majority (Sir Francis Taylor K.C. and Mr. W. F. Hamilton K.C.), found that there was interference with the charterers' business by the direction given to the owners of the ship; and being of opinion that the case was covered by the decision of the Court of Appeal in *Elliott Steam Tug Co.* v. *Shipping Controller* (1) they awarded to the Appellants the full amount claimed. The third member of the Court (Sir Dunbar Barton K.C.) dissented on the ground that there was no evidence of such direct and particular

(1) [1922] 1 K. B. 127.

H. L. (E.) 1923 — MOSS STEAMSHIP CO. v. BOARD OF TRADE.

interference with the Appellants' business as is required to found a claim under the Act. An appeal having been brought to the Court of Appeal on points of law, that Court set aside the decision of the War Compensation Court and dismissed the Appellants' claim but gave leave to appeal to this House."

1923. Oct. 29, 30. *Sir Leslie Scott K.C.* and *Le Quesne* for the appellants. The question of the appellants' right to be indemnified turns upon the construction of the Indemnity Act, 1920, s. 2, sub-ss. 1 (*b*) and 2 (iii.) (*b*) and Part II. of the Schedule to the Act. No claim is made upon the Crown apart from the Act, but by virtue of s. 2, sub-s. 1 (*b*), a loss sustained by reason of interference with the claimant's business confers a right to compensation, even though apart from the Act no legal claim would have arisen. The findings of the War Compensation Court that the appellants' business was that of carriers of goods by their line to the Mediterranean, Black Sea and Egypt, that the *Aberlour* was chartered for that business and no other, and that the direction of the Shipping Controller interfered with that business and caused the losses claimed are findings of fact binding on any appeal. Whatever view is taken of the charterparty the appellants' business was interfered with. It does not matter whether the directed voyage was or was not within the purview of the chartered business. In any case it was an interference with the appellants' business, because it was not being carried on in the way in which the appellants were planning to carry it on. Clause 32 of the charterparty does not impair the appellants' right to compensation, but affects only the relations between the charterers and the shipowners. It cannot qualify the character of the interference by the Government and is irrelevant. This case is governed by the decision of the majority of the Court of Appeal in *Elliott Steam Tug Co.* v. *Shipping Controller*. (1) That decision is not distinguishable on the ground that there the direction was addressed to the charterers, whereas here it is addressed to the owners. The interference with the business is not made indirect by the

(1) [1922] 1 K. B. 127.

direction being addressed to the shipowners and that was not the ground on which the Court proceeded. The loss and damage suffered by the appellants was a direct loss and damage suffered by reason of direct and particular interference with the appellants' business through the direction of the Shipping Controller.

[They referred to *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (1); *A and B Taxis, Ld.* v. *Secretary of State for Air* (2); *Allen* v. *Flood.* (3)]

In this case two of the Lords Justices have proceeded on points not argued either at the hearing or in the Court of Appeal and not covered by the notice of appeal to the Court of Appeal. Bankes L.J. refused the claim of the appellants on the ground that the loss arose through the enforcement of a regulation of general application, and Scrutton L.J. that it was due to the existence of a state of war. Not only are those grounds legally unsound, but they were not open to the Court: *Wilson* v. *United Counties Bank.* (4)

Sir Douglas Hogg A.-G. and *MacKinnon K.C.* (with them *Darby*) for the respondents. 1. There was here no interference with the appellants' business. The real comparison is between a ship compelled to go to Cuba and a ship not licensed to go anywhere. She could not go to Egypt without a licence and she had no licence to go there. The charterparty by clause 1 incorporates any orders given by His Majesty's Government as to sailing routes, so that this voyage to Cuba is within the ambit of the charterparty. 2. If there was an interference it was not a direct interference. The *Elliott Steam Tug Case* (5), assuming that it was rightly decided, is distinguishable, because there the ship was requisitioned from the charterers, and the real point for determination was whether loss of profits could constitute a direct loss within the meaning of the Act. Here the Shipping Controller dealt with the owners throughout. There being

(1) [1913] A. C. 781, 793.
(2) [1922] 2 K. B. 328, 335–6.
(3) [1898] A. C. 1, 179.
(4) [1920] A. C. 102, 106.
(5) [1922] 1 K. B. 127.

H. L. (E.) 1923 — Moss Steamship Co. v. Board of Trade.

here a direction to the owners, the fact that this resulted in their not being able to carry out their contract with the charterers was not a direct interference with the charterers' business. 3. No direct loss or damage resulted from any Government interference. By clause 32 of the charterparty the appellants themselves took the risk of profit or loss in the event of a direction by the Shipping Controller. It is a fair inference that the presence of this clause caused the hire to be less than it otherwise would have been. This argument applies to both the claims, but it applies with particular force to the claim for 14,758*l*. That is a sum which the charterers have had to pay, because for good consideration they contractually undertook to pay it to the owners. Any loss which results from the carrying out of the charterparty is a loss which the charterers have contracted to bear and is not a loss arising from the direction of the Shipping Controller.

Le Quesne replied.

[The following authorities were also referred to: *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) and *Bank Line* v. *Arthur Capel & Co.* (2)]

The House took time for consideration.

1923. Nov. 13. Viscount Cave L.C. My Lords, this appeal, the first to be brought to this House under the Indemnity Act, 1920, raises important questions as to the meaning and effect of that Act. [His Lordship stated the facts and continued:] My Lords, I think it plain that, if the appellants have any claim to compensation, their claim falls under s. 2, sub-s. 1 (*b*), of the Act, and is on the ground that they have sustained direct loss or damage by reason of interference with their property or business in the United Kingdom through the exercise of the powers of the Shipping Controller under the Defence of the Realm Acts. I think it equally clear that the appellants have no legal right to compensation apart from the Indemnity Act, and accordingly

(1) [1916] 2 A. C. 397, 428. (2) [1919] A. C. 435, 442.

that if they are entitled to compensation it must under s. 2, sub-s. 2 (iii.) (*b*), of that Act be assessed in accordance with the principles set forth in Part II. of the Schedule to the Act. Part II. is in the following terms: "The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war, or to the general conditions prevailing in the locality, or to action taken upon grounds arising out of the conduct of the claimant himself rendering it necessary for public security that his legal rights should be infringed, or, in respect of loss of mere pleasure or amenity."

In these circumstances it follows that in order to succeed in their claim the appellants must show direct loss and damage suffered by them by reason of direct and particular interference with their property or business; and the main questions to be considered are: (1.) Was there direct and particular interference with the claimants' property or business? (2.) If so, did direct loss or damage result from that interference?

A further question has been raised in the course of the proceedings—namely, whether the loss was due to the enforcement of an order or regulation of general application, or to the existence of a state of war, so as to be excluded by the latter part of Part II. of the Schedule.

Upon the first point, it is plain that there was no interference with any property of the claimants. The charterparty did not create a demise of the vessel, which remained the exclusive property of the owners, and the charterers had no more than a right by contract to have their goods carried by the vessel during the period of the charter. If, therefore, the claimants are to be successful, it must be on the ground that the direction given by the Shipping Controller to the

H. L. (E.) 1923 — Moss Steamship Co. v. Board of Trade. — Viscount Cave L.C.

owners to offer the vessel for a voyage to and from the West Indies was a direct and particular interference with the charterers' business. In my opinion, it was not such an interference. The direction was not given to the appellants and did not prevent them from carrying goods to the Mediterranean if they had or could obtain the shipping necessary for that purpose. No doubt it prevented the owners from performing their contractual obligation under the charterparty to carry goods for the appellants in this ship to the Mediterranean, and so made it more difficult for the appellants to get the goods so carried; but if this was an interference with the appellants' business, the interference was not a direct but a secondary and indirect result of the direction. As Sir Dunbar Barton pointed out in his judgment in this case, an interference by requisition or otherwise with the property or business of a hotel, garage, factory or shop may involve as a consequence loss or damage to a number of persons who have contracted with the owner of the property or business for the supply of goods or material, the execution of works, or the future hiring or use of rooms, or of cars, or of the property itself; but in such cases the loss suffered by the contractors is not due to direct interference with their business, but is an indirect consequence of the interference by the Crown with the business of the owner with whom they have contracted. Such persons have no claim to compensation under the Indemnity Act, their claim being excluded by the word "direct"; and, in my opinion, the same consideration applies to the claim of the appellants in the present case.

There is a further consideration which is relevant to a part of the appellants' claim—namely, their claim for repayment of the 14,758*l.* loss on the voyage to the West Indies. That loss did not result from the direction given by the Shipping Controller to the owner of the vessel, but from the express contract of the appellants contained in clause 32 of the charterparty to take the risk of any directed voyage. If the Shipping Controller by his direction created a condition of things which brought that clause into operation, it cannot

(I think) be said that by so doing he directly interfered with the appellants' business. At most he did that which by reason of the appellants' contract resulted in their undertaking the directed voyage, but that venture was the consequence not of the direction but of the contract.

The above considerations also provide an answer to the question whether, if (contrary to my opinion) there was direct interference with the appellants' business, direct loss or damage resulted from such interference. I understand the expression in the statute " direct loss or damage suffered by the claimant by reason of direct and particular interference " to mean loss or damage directly caused by such interference, and to exclude loss due to the intervention of other factors such as the appellants' contract in clause 32 of the charter. If so, this would exclude any claim for the 14,758*l.* even if otherwise capable of being sustained, though not (I think) the claim for 6198*l.* But it is unnecessary for me to deal with this point, as in my view the claim wholly fails for the reasons above stated.

For the same reason it is unnecessary to deal at length with the point upon which Bankes L.J. relied—namely, that the latter part of Part II. of the Schedule to the Act prevents any award in respect of loss or damage arising through enforcement of an order of general application. The point was not clearly raised in the notice of appeal; and I think it sufficient to say that it does not appear to me that the direction given to the owners in this case can be described as the enforcement of an order of general application. It was a particular direction given under a general order. On the other hand, reg. 39 D D, which rendered it illegal for a British ship to sail without a licence, was (I think) an order of general application; but the finding of the War Compensation Court that the direction and not the refusal of the licence was the effective cause of the *Aberlour* not proceeding to the Mediterranean is a sufficient answer to the argument of the respondents based on the regulation last mentioned. I do not think that the loss was due " simply and solely " to the existence of a state of war.

H. L. (E.) 1923 Moss Steamship Co. v. Board of Trade. Viscount Cave L.C.

Upon the whole, I am of opinion that the appellants' claim fails on the ground that there was no evidence of direct and particular interference with their property or business, and also, as regards the 14,758*l.*, on the ground that the loss of that sum was not direct loss within the meaning of the Act; and, accordingly, I move your Lordships that the appeal be dismissed with costs.

My Lords, my noble and learned friend Lord Sumner desires me to say that he concurs in this judgment.

Viscount Haldane. My Lords, I think it is a crucial fact in this case that by clause 32 of the appellants' charterparty they had contracted with the owners of the ship that should the Government during the currency of the charter direct the ship for any voyage, the direction was to be for the charterers' account. The charterers need not have made this stipulation. Possibly they accepted it in the hope that the Government rate of freight would prove to be high. Possibly they were pressed into it by the owners. But, for whatever reason, they did make the bargain, with the result that the hire of the ship at a fixed rate for the purposes of voyages directed by the Government became part of the business covered by the charterparty, and it was this fixed rate which was the main factor in determining between profit and loss. For the business so established the *Aberlour* was chartered by the appellants by time for fifteen months. The charterparty did not operate by way of demise, but was simply a contract by which her owners undertook during the agreed time to render to the appellants the service of providing their ship for voyages which the charterers were to designate. The rights of the charterers were thus merely contractual, and their business consisted in enterprises in which these contractual rights could be exercised. Even if they were exercised for voyages under the direction of the Government, that, as between the owners and themselves, was, by special stipulation, to be for their own account, and the service directed was therefore to be like any other part of the business on which the ship was to be employed by them.

The Shipping Controller had at the time powers under a general regulation to direct ships to proceed to various ports and there to take up cargoes. The *Aberlour*, the steamer in question, was, when a Government direction was given to her through her owners, about to make a voyage for the appellants to the Mediterranean. Had she done so we are to assume that she would have made a profit of 6198*l.* The Government did not make a requisition of the ship, but simply directed her owners that the *Aberlour* was, instead of going to the Mediterranean, to proceed to Cuba, and there load a cargo of sugar at a standard rate of freight. The owners passed this direction on to the appellants. The latter made the voyage to Cuba as directed. They lost 14,758*l.* on balance thereby, and they claim that they have also lost the profit of 6198*l.* on the Mediterranean voyage which had been in prospect. The question is whether they can claim against the Government both or either of these sums. Against the owners no such claim can be made by them, for it is evident that the latter have provided just the service they contracted to render and that the appellants contracted to pay them at an agreed rate.

My Lords, by the common law no such claim could be made against the Crown, and it is only under the Indemnity Act of 1920 that it can lie here, if it does lie. That Act enables a claim to be made even where the claimant has no legal right. But in such a case as this the compensation is to be assessed exclusively on the principles set forth in Part II. of the Schedule to the Act. This part of the Schedule provides that account is to be taken only of the "direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing is to be included in respect of any loss or damage due to or arising through the enforcement of any Order of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war." The claim can accordingly only be one for loss directly flowing from a particular act of interference by the Government. But here the loss had as its direct cause the amount which the

H. L. (E.) 1923

Moss Steamship Co. v. Board of Trade.

Viscount Haldane.

charterers had to pay to the owners for hire of the ship. If this had been less there would have been no loss, and on it and also on the high rate of freight in the market at that time depended the prospective profit.

My Lords, in the case of *Elliott Steam Tug Co.* v. *Shipping Controller* (1) there had been a complete requisition of a tug by the Admiralty, and the majority in the Court of Appeal held that this was an interference which caused direct loss or damage to the business of the charterers, who were therefore, under the Act, entitled to compensation. This loss or damage was treated as being the direct result of the requisition, although Scrutton L.J. dissented on the ground that the charterer could not recover at common law for damages for loss of rights which arose wholly out of the contract between him and the owners. Which of these views was correct it is not necessary to consider in the present case, where there was no such requisition. By clause 32 of the charterparty the charterers undertook that if there were a Government direction it was not to take the hiring outside the charterparty, but that the directed voyage was to be treated as being within the contract, and for the charterer's account. The members of the Court of Appeal in the present case agreed in thinking that the real reason of the loss was this contract under which the charterers undertook that they would pay the scale of hire stipulated for by the owners and would carry out any Government direction on the footing that it related to a service falling within the provisions of the charterparty.

My Lords, I think that this conclusion was the true one. Under the statute the loss or damage has to be direct and suffered by reason of direct and particular interference by the Government with the property or business. To make clear the restriction as regards causation it is declared that no loss or damage is to be included which is merely due to or arises out of the enforcement of regulations of general application. What the Legislature appears to me to have intended to provide for are cases in which, there being no remedy under the ordinary law, loss or damage has been the immediate

(1) [1922] 1 K. B. 127.

outcome of a particular interference by the Government with property or business and has not been the result of some intervening act done by the claimant himself or by some other person, such as an agreement to pay a special rate of hire. What was in this sense the direct and immediate cause of loss in the restricted contemplation? No doubt in one aspect the direction given by the Government included it as an element. For we must take it that without this direction the appellants would have earned the 6198*l.* and would not have lost the 14,758*l.* But the aspect in which that is so is not the only or the dominant aspect presented by what happened. If the charterparty had not bound the appellants to the owners to carry out the directed voyage as one falling within a business which the contract covered in detail, the voyage might not have taken place or might have taken place on terms which would have resulted either in no loss or less loss. The direct cause of the loss was in other words dependent directly upon another element or factor, the onerous character of the payments which the appellants had to make to the shipowners. The possible outcome of this feature of their bargain the charterers had probably not foreseen. Had they foreseen the pecuniary consequences to themselves, it is not likely that they would have accepted a clause which extended in an obligatory fashion the scope of possible voyages for which they were to pay the owners. But perhaps they thought that freights even for Government carriage would go higher. Anyhow they had to pay the owners on the scale on which they had agreed to pay, and it is this which appears to me to have been the direct cause of the loss of the 14,758*l.* No doubt when the cause of anything has to be defined it is impossible to pick out any one fact and to say that taken in isolation it is the exclusive and self-contained cause of the effect. Every effect implies for its complete explanation the whole of the circumstances of the universe, past as well as present. But it is not complete explanation, such as omniscience alone could take in, that is sought after either in law Courts or in laboratories. What is sought after is only such circumstances

H. L. (E.) 1923 — Moss Steamship Co. v. Board of Trade. — Viscount Haldane.

as are decisive for a problem which is defined by the particular aspect of the world which is under consideration. Now here we have that aspect prescribed for us by Part II. of the Schedule to the Indemnity Act.

The effect, the loss for which we have to find a cause, in the sense in which we are directed to search, is not to be anything such as the enforcement of some general regulation under which voyages may be compulsorily directed. Such a general regulation may well be an important factor if it has made possible the infliction of loss such that the loss has flowed directly from special interference. Now here I think it flowed directly from the rash bargain which the appellants had made. For excepting as the outcome of that bargain it does not appear that the 14,758*l.* would have been lost. From the voyage account of the sailing across the Atlantic it appears that the charterers received over 33,000*l.* That they had to pay hire in excess of this amount was the result of their own stipulation in clause 32. For analogous reasons I think that the profit of 6198*l.* had its direct cause or reason in the particular terms of the charterparty, and that its absence was therefore not the direct outcome of the direction. It was dependent on the terms of the contract whether there was to be either profit or loss. For some purposes, and in a particular aspect, the direction might have been treated as occasioning these, but not, as it seems to me, for the purpose and in the aspect to which Part II. of the Schedule limits a claimant who has no enforceable rights at common law, and who is restricted to what the words of the Second Schedule give him. What the direction did was to bring the restrictive scale of a general regulation into operation. It was clause 32 that was the immediate and particular causal factor as regards both loss and profit during this part of the charter period.

I therefore agree with the decision arrived at by the Court of Appeal.

Viscount Finlay (read by Lord Parmoor). My Lords, this case raises an important question upon the Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48).

The facts of the case are very simple. The owners of the *Aberlour* were the Adam Steamship Co., Ld., and by charter-party dated July 16, 1919, they let the vessel to the Moss Steamship Co., Ld., as charterers for fifteen months. Clause 9 made the usual provision that the captain, though appointed by the owners, should be under the orders and direction of the charterers as regards employment agency or other arrangements. Clause 32 was in the following terms :—

"32—This charter party is subject to first voyage licence being obtained, but, if during the currency of this charter, steamer is directed by the British Government, or in the event of licence being refused for voyages nominated by charterers from time to time for some voyage or voyages, this direction is to be for charterers' account and this charter party with all its conditions to remain in force between the charterers and owners. Should steamer be requisitioned by British Government this charter to be null and void."

This clause was a very usual one. It will be observed that it deals with the case of the vessel being directed by the British Government or the licence being refused for voyages nominated by charterers from time to time for some voyage or voyages ; in such cases " this direction is to be for charterers' account," but if the steamer should be requisitioned by the British Government, the charter is to be null and void.

The vessel was employed by the charterers in the Mediterranean trade. On December 15, 1919, the Ministry of Shipping sent a letter to the owners of the *Aberlour*, in which they stated that at the conclusion of the voyage on which the *Aberlour* was then engaged the owners were directed to offer the steamship to the Royal Commission on Sugar Supplies for the carriage of a cargo of sugar to the United Kingdom. Protests were made on behalf of the appellants, but the Ministry of Shipping insisted on the direction and refused on January 3, 1920, the licence for the voyage to the Mediterranean, and the *Aberlour* proceeded to Cuba accordingly under a charter made between the owners and the Royal Commission on Sugar Supplies, which provided that the vessel should proceed to Cuba and there load a cargo of sugar from

H. L. (E.) 1923

MOSS STEAMSHIP CO. v. BOARD OF TRADE.

Viscount Finlay.

the factors of the charterers and carry it to a port in the United Kingdom as ordered. The sugar was shipped accordingly in Cuba and carried to Liverpool, and during the whole of the time so occupied the *Aberlour* was compulsorily engaged in Government service under the order.

I turn to the Indemnity Act, 1920. The first section prevents any proceedings whether civil or criminal in respect of acts done in good faith during the war in the public interest by any person under the authority of the Crown.

The second section provides for compensation in respect of acts done in pursuance of prerogative or other powers of the Crown. The first sub-section of this clause makes provision with regard to ships which, or any cargo space or passenger accommodation in which, have been requisitioned on behalf of the Crown during the war, and provides that the owner shall be entitled to payment or compensation for the use made of the vessel and for services rendered, and to compensation for loss or damage thereby occasioned. The amount is to be assessed by the tribunals mentioned in s. 2, sub-s. 4. The compensation is, apart from any special provisions, to be assessed according to the principles acted on by the Board of Arbitration constituted under the Proclamation issued on August 3, 1914 (s. 2, sub-s. 2 (i.) and (ii.)), as set forth in Part I. of the Schedule to the Act. These principles provide that the compensation for the use of the vessel in whole or in part shall be based on what are known as the Blue Book Reports providing for rates of payment wherever applicable, together with a sum by way of compensation for any loss or damage caused to the ship and directly due to the use made of it; so, however, that nothing shall be awarded for any other damage or loss incidentally caused to the owner or to other persons.

Under these provisions the owner gets payment only for the use made of the vessel at the prescribed rates and compensation for any damage to the ship directly due to such use.

It will be seen that no claim for loss of profits is admissible and that the compensation is given only to the owner. There is no provision for compensation to persons who have suffered

by the requisition in respect of contractual rights with regard to the ship. No claim by a charterer under the ordinary form of charter could be entertained under the provisions to which I have just adverted; the charterer has merely contractual rights to have the services of the vessel and crew and no compensation is given in respect of such rights.

The principle on which the Act proceeds in cases where a ship has been requisitioned in whole or in part is that only the owner can claim and that he can get nothing except payment for the use made of his vessel at the prescribed rates plus the amount of actual damage to the ship from such use, and s. 2, sub-s. 1 (*a*), with the subsidiary provisions, is the only part of the Act which makes provision for compensation for the use of a ship which has been requisitioned in whole or in part.

Having dealt under head (*a*) with ships requisitioned, the Act goes on in the same sub-section to deal under head (*b*) with the case of any person "who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise of any prerogative right or similar power."

I think that the word "otherwise" under head (*b*) denotes that the damage must have been sustained otherwise than by the fact that a ship or cargo space or passenger accommodation in it has been requisitioned. The Legislature had just dealt with that case under (*a*) and had limited the right of claim to the owner of the ship, to the exclusion of all other persons and of all claim for damages in respect of loss of profits. There was, of course, a vast number of cases in which the prerogative of the Crown had been used for the general good, but with damage to particular persons, in matters which had nothing to do with the requisitioning of ships. It is to such other cases that the Legislature turns when under head (*b*) it makes provision for damage otherwise occasioned.

Under head (*b*) are included all cases of the exercise of the rights of the Crown, prerogative or statutory, with regard to property other than ships and also cases affecting ships otherwise than by the requisitioning of the vessel or part of it.

H. L. (E.) 1923 — Moss Steamship Co. v. Board of Trade. — Viscount Finlay.

In such cases the compensation is to be ascertained on the principles set out in Part II. of the Schedule, as those on which the Defence of the Realm Losses Commission had hitherto acted. Head (*b*) reads as follows :—

" (any person) ". . . .

" (*b*) who has *otherwise* incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage " ; and Part II. of the Schedule is as follows :—

" Part II.

" *Principles on which the Defence of the Realm Losses Commission has hitherto acted.*

"The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war, or to the general conditions prevailing in the locality, or to action taken upon grounds arising out of the conduct of the claimant himself rendering it necessary for public security that his legal rights should be infringed, or in respect of loss of mere pleasure or amenity."

The precise sense in which the word " requisition," whether noun or verb, is used, may vary according to the context. It means a request or demand for something and is generally used in cases where there is some authority or power of enforcement behind the request or demand. It is as applicable to the demand of a ship for one particular service as to the demand of a ship for a long period or to taking it altogether

out of the hands of the owner—it is as applicable to requiring the services of the ship and crew, as it is to requiring the delivery up of the ship alone.

In the charterparty, clause 32, which I have already set out, it is used in contradistinction to cases in which the vessel gets a direction for some particular service or is prevented by refusal of a licence from going on some particular voyage—in either of these cases the charter continues to operate—while if the vessel is "requisitioned" the charter is to be null and void. In clause 32 it clearly refers to the case in which the Government themselves take over the vessel, whether they work it or not, and whether they work it with the old captain and crew or with others. But in s. 2, sub-s. 1 (*a*), of the Act, it is used not merely with reference to taking over the ship, but is also applied to cases in which only cargo space or passenger accommodation has been taken and to cases in which the use of the ship has been required with its captain and crew, for whatever period or occasion.

Light is thrown on the difference between directions and requisitions by the Defence of the Realm Regulations, 39 B B B. The first clause of that regulation provides that the Shipping Controller may make orders regulating, restricting, or giving directions with respect to the nature of the trades in which ships are to be employed, the traffic to be carried therein, terms and conditions, ports, rates, bills of lading, building, repairing, use of docks, and many other matters relating to shipping. This is a power of directing the manner in which the business of shipowners and others is to be carried on with reference to ships.

The third clause gives the power of requisition. It is as follows:—

"(3.) The Shipping Controller may by order requisition or require to be placed at his disposal, in order that they may be used in the manner best suited for the needs of the country, any ships, or any cargo space or passenger accommodation in any ships, or any rights under any charter, freight, engagement, or similar contract affecting any ship, and require ships so requisitioned to be delivered to the Controller or any person

H. L. (E.) 1923 Moss Steamship Co. v. Board of Trade. Viscount Finlay.

or persons named by him at such times and at such places as the Controller may require, where it appears to the Controller necessary or expedient to make any such order for the purpose of making shipping available for the needs of the country in such manner as to make the best use thereof, having regard to the circumstances of the time.

"Such compensation shall be paid in respect of the use of a ship or cargo space or passenger accommodation requisitioned under this regulation and for services rendered during the use thereof, and for loss or damage thereby occasioned as in default of agreement may be determined by the Board of Arbitration constituted under the Proclamation of the third day of August, nineteen hundred and fourteen, respecting the requisitioning of ships by the Admiralty."

The provisions as to compensation in this the last paragraph of clause 3 of this regulation have been embodied in the provisions made in the Indemnity Act, 1920, as to compensation under s. 2, sub-s. 1 (*a*), which relates to requisition.

It would therefore appear that the requisitions dealt with by s. 2, sub-s. 1 (*a*), are those dealt with by the third clause of reg. B B B, while the cases of damage "otherwise" incurred, for which s. 2, sub-s. 1 (*b*), of the Act makes provision, would include any orders made by the Shipping Controller under the first clause of the regulation.

The fourth clause of the regulation provides for the service of notices:—

"(4.) Any order made under this regulation affecting any ship may be served on the owner of the ship, and shall be deemed to be sufficiently served if sent by registered post addressed to the managing owner or other person to whom the management of the ship is entrusted by or on behalf of the owner at his registered address."

I think that this provision is one merely for convenience of service. It does not require service on the owner. It merely provides that it may be served on him and that it shall be deemed to be sufficiently served if sent by registered post to the managing owner or other person entrusted with the management. Persons other than the owner may be

affected by the order, but there might be great difficulty and delay if it were necessary to serve them all. The regulation proceeded on the view that for practical purposes it was enough to send the notice to the owner, who would in all probability be in communication with such persons.

This provision (clause 4) does not appear to me to affect the construction to be put on clauses 1 and 3 of the regulation.

Upon the facts of this case and the documents to which I have referred, it might have been contended, on behalf of the Crown, that this case falls under s. 2, sub-s. 1 (*a*), of the Act as being a case in which in terms of that clause a vessel was requisitioned during the war, and that the only claim that could be made is one by the owner, while s. 2, sub-s. 1 (*b*), relates only to loss or damage otherwise incurred. If this contention were well founded it would afford a complete answer to the claim, inasmuch as a charterer has no locus standi to claim under s. 2, sub-s. 1 (*a*). This point, however, was not taken on behalf of the Crown and the case was throughout treated as falling under head (*b*). It follows that it is impossible on this appeal to support the judgment of the Court of Appeal upon the ground that this was a case of requisition, since that ground was not taken for the Crown and the appellant has, consequently, never been heard upon it. We must deal with the case on the basis on which it has been treated by all parties and by the Courts below as falling under head (*b*) of s. 2, sub-s. 1. If the question whether such a claim as the present can be properly so treated is to be considered it must be in some other case.

The Court of Appeal were of opinion that the claimants' case failed on the ground that it does not satisfy the conditions prescribed by Part II. of the Schedule as applying to cases under (*b*).

Three grounds of objection are enumerated in the judgment of Bankes L.J. (1)

The first was that there was no interference with the property or business of the claimants, the charterers.

The vessel, of course, was not the property of the

(1) [1923] 1 K. B. 447, 453.

H. L. (E.) 1923 Moss Steamship Co. v. Board of Trade. Viscount Finlay.

charterers. Was there an interference with their business? It was argued that there was none, on account of the terms of clause 32 of the charterparty, by which in case of a "direction" by the British Government this "direction" is to be for the charterers' account, and the charterparty, with all its conditions, is to remain in force between the charterers and owners. It was said that on the direction to proceed to Cuba being given the Cuban voyage became, by force of this clause, part of the charterers' business, and that the voyage of the *Aberlour* to Cuba and back was brought about by their own contract. Bankes L.J. intimated that he thought there was great force in this argument, but did not rest his judgment upon it.

In my opinion this argument fails. The question is whether there was an interference by the order with the business of the charterers. The charterers had the right to determine, subject to licence, to what part of their business the services of the *Aberlour* should be appropriated. Even if it were assumed that the Cuban voyage became part of their business the order compelled them to devote their vessel to it to the exclusion of the employment in the Mediterranean, to which it would otherwise have been assigned. A man's business is interfered with if he is not allowed to conduct it according to his own judgment and if he is compelled to send his vessel on an errand other than that which he had in view, even if the new errand falls within the ambit of his business. Even if the direction of the Government through the Shipping Controller had been to do something within the scope of the charterers' business in the strictest sense, as if it had been a direction to go, say, to the Black Sea instead of to Egypt, such an order would have been an interference with the charterers' business, and if loss of profit was thereby occasioned owing to the diversion of the vessel from a more lucrative adventure, it might have given ground for a claim to compensation.

There can be no more direct and palpable interference with a business of this description than a direction to proceed to a destination other than that which the person having

control of the vessel had selected, whether the new destination be within or without the ambit of his business. The charterer, in the ordinary course of his business, has determined to send his vessel to Port A.; the Government make an order that he should send her to Port B.; if this is not interfering with the business, what can be?

It was the order of the Controller that made it necessary that the *Aberlour* should go to Cuba, and the necessity of making that voyage interfered with the business of the company. Clause 32 merely provides the most convenient way of carrying out such a direction, which, of course, must be obeyed. Clause 32 did not make the Cuban voyage part of the business of the charterers. It provides that the charterparty is to remain in force and that the vessel is to be used on its compulsory errand for the job imposed upon it by the Government. It is merely a provision for carrying out a direction from the Government in such a way that it shall not be treated as a frustration of the charterparty so as to put an end to it. It is for the purpose of carrying out in the manner most convenient for all parties the order made by Government that the charterers undertake with the owner, for the purpose of keeping the charterparty alive, to do under it something which was outside their business in any reasonable sense of the term.

The second ground mentioned by Bankes L.J. was that even if there was interference it was not "direct and particular interference with the business." This point appears to me not to be arguable. A direction that a vessel shall go to a port other than that to which the charterer wanted to send her is as direct and particular an interference with the business as can be imagined. None of the Lords Justices expressed any opinion on this point; Bankes L.J. said that it might arise in some other case and that he would not decide it in this. (1)

The third ground urged in the Court of Appeal was that if there was an interference and if that interference was "particular" it was due to the enforcement of an order of

(1) [1923] 1 K. B. 454, 455.

H. L. (E.) 1923

MOSS STEAMSHIP CO. v. BOARD OF TRADE.

Viscount Finlay

general application, and therefore could not form the subject of a claim under Part II. of the Schedule.

It was on this ground that Bankes L.J. based his judgment against the claimants. He said: "I think that it was" (due to a general regulation), "and it is on that conclusion that I prefer to found my judgment. Those words appear to me to cover this case completely, whether it be looked at from the point of view of the charterers having anticipated its application by the manner in which they conducted their business, or from the point of view of its actual application to their particular case. In either view the loss was due to the enforcement of a regulation of general application."

In my opinion this proposition cannot be supported. Under a regulation of general application—namely, Defence of the Realm Regulation 39 B B B—the Shipping Controller had power by order to requisition or require to be placed at his disposal any ship. It was under this general regulation that the particular order was made that the *Aberlour* should proceed to Cuba and take on board a cargo of sugar for the United Kingdom. It was this particular order that caused the loss. The provision in Part II. of the Schedule that nothing shall be included in respect of "the enforcement of any order or regulation of general or local application" relates to general orders or regulations which proprio vigore require that those in control of shipping shall do or not do certain things. It has no reference to general rules or regulations which merely give power to make particular orders, and which until such particular order is made have no effect whatever upon those in control of any ship. General orders which prescribe a certain course of conduct of ships under certain circumstances or in certain localities do not give rise to any claim for compensation even if the particular shipowner may sustain some loss in consequence of his enforced obedience to such orders. The damage in the present case was entirely due to the particular order made under a general power.

Warrington and Scrutton L.JJ. did not express any opinion on this point.

Warrington L.J. rested his judgment in favour of the Crown entirely upon the thirty-second clause of the charter. In his opinion the effect of this clause was that when the order to proceed to Cuba was given it became part of the charterers' business to comply with it and that for this reason the order did not interfere with the business. Such a construction seems to me untenable. The business of the charterers was, as found by the War Compensation Court, that of a carrier of goods by their line of steamers to the Mediterranean, Black Sea or Egypt, and I do not see how the finding of the War Compensation Court that this business was interfered with by the order can be successfully attacked.

Scrutton L.J. in his judgment stated that he adhered to the views expressed by him in his dissentient judgment in the *Elliott Steam Tug Case*. (1) He said that the judgment of the majority in that case precluded him from acting on his own view. The view taken by Scrutton L.J. in the *Elliott Steam Tug Case* is on the same lines as that to which I referred as not being open upon this appeal—namely, that the case was one of requisition and fell under s. 2, sub-s. 1 (*a*). Scrutton L.J. rested his concurrence in the judgment in the present case upon two other grounds. The first was clause 32 of the charter, with which I have already dealt. The second was that "the loss results from the fact that it was not profitable to employ a substituted ship in the business because of the high rates charged for ships owing to the existence of a state of war." With regard to this I will only point out that the provision of Part II. of the Schedule, that nothing shall be included in respect of any loss or damage due simply and solely to the existence of a state of war, cannot, in the circumstances of the present case, have the effect which the Lord Justice ascribes to it. The damage was not caused simply and solely by the existence of war; it was caused by the order "Proceed to Cuba," and the existence of war only prevented the charterers from getting another vessel to take the place of the *Aberlour*. It was certainly not caused simply

(1) [1922] 1 K. B. 127.

H. L. (E.) 1923 Moss Steamship Co. v. Board of Trade. Viscount Finlay.

and solely by the existence of war; the existence of war merely interfered with their getting another vessel to prevent the damage which resulted from the order.

In the argument for the Crown at your Lordships' Bar, the first point urged upon the House was one which does not appear in the reports of the case in the Court below, and would appear to be entirely novel. It was that the real cause of the voyage was not the order to proceed to Cuba but the refusal of a licence to proceed to Egypt, and that no action can be brought for the refusal of a licence. This contention overlooks the fact that the refusal of the licence to proceed to Egypt was itself merely a consequence of the direction to proceed to Cuba. It would have been absurd to give a licence for the *Aberlour* to proceed to Egypt when the Controller had just directed that she should go to Cuba. The War Compensation Court found that this direction was the effective cause of the *Aberlour's* not proceeding to the Mediterranean and that the refusal of the licence followed as a consequence of the direction. It appears to me to be impossible seriously to contest the correctness of this finding. This argument for the Crown proceeds on the assumption that what was a mere consequence of the direction to proceed to Cuba is to be treated as the real cause of what ensued.

In dealing with the contention for the Crown that the loss was the result of the claimants' own act in agreeing to clause 32 it is necessary to distinguish between the two items of damage claimed. As regards the 14,758*l.* claimed in respect of the Cuban voyage, clause 32 affords a complete answer. That sum represents the loss sustained on the voyage to Cuba and thence to the United Kingdom with the sugar cargo, being the excess of the disbursements over the receipts thereon. That loss fell upon the claimants entirely because they had taken that voyage upon themselves by clause 32. It was not a result of the requisition at all. On the other hand the 6198*l.* claimed was lost as the direct result of the order directing that the vessel should proceed to Cuba; that order withdrew the vessel from the Mediterranean voyage for which she was booked and on which she would

have made a profit to that amount. The loss of that profit had nothing to do with clause 32 or with the fact that it was the charterers who took the vessel to Cuba and back with the sugar; it resulted purely from the order directing the vessel to go to Cuba, which prevented the Mediterranean voyage.

In my opinion the damage caused by the loss of the 6198*l.* profit was the direct result of the order which withdrew the *Aberlour* from the business of the charterers, as found by the War Compensation Court.

The War Compensation Court awarded the claimants 20,956*l.*, made up of two sums, 14,758*l.* for the voyage and the further sum of 6198*l.* for loss of the profit which would have been made on the Mediterranean voyage. Sir D. P. Barton, one member of the Court, dissented; the judgment was given by the chairman, Sir Francis Taylor, on behalf of himself and Mr. W. F. Hamilton. On appeal to the Court of Appeal this decision was set aside, the Court of Appeal being of opinion that the claim should be disallowed altogether.

It appears to me that the award of the Court must be modified by elimination from it of the 14,758*l.* awarded in respect of the Cuban voyage. The question is, what damage was done to the business of the appellant company? This business was treated, and correctly treated, by the War Compensation Court as being the Mediterranean and Black Sea business carried on by them, and the whole damage done to that business was 6198*l.*, the amount of the profit which would have been earned on the Mediterranean voyage, which was prevented by the order to proceed to Cuba. I cannot regard the compulsory Cuban voyage as part of the business of the company. The 14,758*l.* was loss upon the Cuban venture, which the charterers undertook in compliance with the obligation that they had entered into by clause 32 of the charterparty, and I do not see how it can be brought within the terms of Part II. of the Schedule. The claim for loss of profit which would have been earned by the Mediterranean voyage stands on a totally different footing. That was a loss in the business carried on by the charterers,

H. L. (E.) 1923

MOSS STEAMSHIP CO. v. BOARD OF TRADE.

and it was incurred directly in consequence of the order to proceed to Cuba.

The award should, in my opinion, stand, but for 6198*l.* only.

LORD PARMOOR. My Lords, I agree in the judgment I have just read of my noble and learned friend, Viscount Finlay, but I have prepared one of my own, which I will read. The Indemnity Act, 1920, places a restriction on the taking of legal proceedings against certain persons acting in good faith, and provides a right to compensation, under certain limited conditions. The appellants were charterers of the steamship *Aberlour*, on a time charter, for fifteen months. During the time covered by the charter the Ministry of Shipping, by a direction to the owners, directed that the ship should proceed to Cuba, and bring a cargo from there to the United Kingdom for account of the Sugar Commission.

The tribunal of the War Compensation Court, by a majority, decided that the appellants did bring themselves within the provisions of the Act and of Part II. of the Schedule, and awarded to them two sums—namely, 6198*l.*, loss of profits, and 14,758*l.* 16*s.* 10*d.*, which is described, as loss of hire. So far as the amount is concerned, these figures are agreed between the parties. The decision of the tribunal is final, subject to the right of either party, if it feels aggrieved by any direction or determination of the tribunal, on any point of law, to appeal to the Court of Appeal. By leave of that Court, but not otherwise, there is an appeal to this House.

In the notice of appeal the respondents asked that the claim, both in respect of loss by hire, and loss of profit, be dismissed with costs, and set out the points of law by the direction or determination of which they were aggrieved.

(1.) That the direction given to the owners was a direct and particular interference with the property of the charterers.

(2.) That there was any direct or particular interference with the property or business of the charterers.

(3.) That the charterers have suffered direct loss or damage by reason of a particular interference with the charterers' property or business.

I do not understand that there has been any application to enlarge these points of law, and the argument of the Attorney-General was within these limits.

Sect. 2 of the Act divides the right to claim compensation under two heads: (*a*) is limited to the case of an owner of a ship or vessel which, or any cargo space or passenger accommodation in which, is requisitioned at any time during the war. It is clear that the appellants, who had no interest as owners in the *Aberlour*, could not recover any sum in the nature of compensation under this head. The true effect or meaning of (*a*) was not argued before your Lordships, and I desire to give no opinion on this point. The appellants based their claim on (*b*), and, if, on other grounds, they can substantiate their claim to compensation, I can see no valid argument for saying that they are not within the category of persons who have otherwise incurred or sustained loss or damage by reason of interference with their business in the United Kingdom. Certainly the case has throughout proceeded on the inquiry, whether the claim made by the appellants is a direct loss or damage, capable of assessment under the provisions of Part II. of the Schedule.

Part II. of the Schedule enacts that the loss for which compensation is to be assessed shall be only a direct loss by reason of direct and particular interference with the property or business of the claimant. In this case the allegation is of interference, not with the property of the appellants, but with their business.

Part II. of the Schedule further enacts that "nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war, or to the general conditions prevailing in the locality, or to action taken upon grounds arising out of the conduct of the claimant himself rendering it necessary for public security that his legal rights should be infringed, or in respect of loss of mere pleasure or amenity."

H. L. (E.) 1923 MOSS STEAMSHIP CO. v. BOARD OF TRADE. Lord Parmoor.

In the Court of Appeal Bankes L.J. founds his judgment on the application of the words, "due to or arising through the enforcement of any regulation of general or local application." I do not think that the interpretation of these words adopted by the Lord Justice can be supported. The order, on which the claim of the appellants is based, is the special direction given to the owner of the vessel, and this is not an order or regulation of general or local application, operating after it has been promulgated, without the necessity of further notice to the person or persons who will be affected. The efficacy of the order depends on the special notice served on the owners of the vessel. Warrington and Scrutton L.JJ. do not express an opinion on this point. Warrington L.J. rested his judgment in favour of the Crown on the contractual position created by the charter, and particularly on s. 32. Scrutton L.J. refers to his judgment in the *Elliott Case* (1), and states that a charterer cannot recover direct loss in their business under the second part of the Schedule, (1.) by the fact of his own contract binding him to carry out the directions on his own responsibility, and (2.) by the fact that his loss also results from the fact that it was not profitable to employ another ship in his business, because of high rates charged for ships owing to the war.

It will be convenient to deal with the points raised in the judgments of Warrington and Scrutton L.JJ. in connection with the argument which the learned Attorney-General addressed to your Lordships.

The Attorney-General stated his argument under four heads. He urged, in the first place, that the loss, of which the appellants are complaining, was due not to the order to proceed to Cuba but to the refusal of a licence to proceed to Egypt, and that no compensation is payable for the refusal of a licence. It does not appear that this point was urged in the Court below, and it does not appear to me to be raised in the reasons attached to the appellants' case; but in any case, the matter is determined by the finding of the majority of the tribunal. "We find that such direction was the

(1) [1922] 1 K. B. 127.

effective cause of the *Aberlour* not proceeding to the Mediterranean, and that the refusal of the licence followed as a consequence of the direction." I see no reason for differing from this finding. The effect is that the refusal of the licence was a consequence of the direction to proceed to Cuba, and not the cause of interference with the voyage on which, but for the direction, the *Aberlour* would have proceeded. It further appears there was never any difficulty in obtaining a licence, except in the period covered by the direction, and that the licence was given so soon as the voyage to Cuba had been carried out.

In the second place the Attorney-General raised the question what was the business of the appellants? This is a question of fact. The test is what trade was in fact being carried on at the material date, and not what trade might have been carried on, within the ambit of the trading limits defined by the charterparty. The majority of the tribunal state "we find the charterers' business was that of a carrier of goods by their line of steamers in the Mediterranean, Black Sea, and Egypt." They further find, "that the *Aberlour* was chartered as a vehicle for carrying on this business and no other."

The third question propounded by the Attorney-General is whether there was interference with the business as above defined? The majority found that the business of the appellants was interfered with by the direction of the Shipping Controller. This, again, is a question of fact, and no point of law is involved. It is, however, hardly possible to suggest that a direction, which withdrew the *Aberlour* from the business of the appellants for 120 days, was not an interference with their business. Assuming that it was found that the voyage to Cuba was within the business of appellants, there is, in my opinion, interference with the business of the appellants in diverting a vessel, against the protest of the appellants, from a voyage which for the purposes of their business they had intended to undertake, and from which they would have derived profit.

The fourth question raised by the Attorney-General is

H. L. (E.) 1923 Moss Steamship Co. v. Board of Trade. Lord Parmoor.

directly in accord with the notice of appeal. Was the direction to the owners a direct and particular interference with the business of the charterers? Further, was there any direct and particular interference with the business of the charterers? At the time when the direction was given to the owners the *Aberlour* was, in fact, being employed as part of the fleet used in the carrying on of the business of the claimants, and, but for the direction to the owners, would have continued to be so used. The vessel was part of the equipment provided to carry on the business of the appellants, and contributed to the business profits. To withdraw a portion of the equipment by which a business is being carried on is, I think, a direct interference with the business. The interference was particular, in that it was not an act which affected the business of carriers generally, or the business of the carriers engaged in the same business or the same locality as the appellants, but only their own special business. The word "particular" provides against a claim for loss, where such loss results from a common inconvenience, which affects all His Majesty's subjects, or some class of them, including persons other than the particular claimant. It is not enough, however, that there should be direct and particular interference with the business of the appellants, unless it can be shown that the appellants have suffered direct loss or damage by reason of such direct and particular interference with their business.

Were the sums of 6198*l.* or 14,758*l.* 16*s.* 10*d.* or either of them a direct loss attributable to the direction of the Shipping Controller? The sum of 6198*l.*, which is an agreed figure, is the loss of profit in fact suffered through the withdrawal for a period of 120 days of a vessel actually in use in the business of the appellants at the time of withdrawal, or alternatively through the diversion of such vessel from the Mediterranean trade, against the protest of the appellants. This withdrawal was brought about by the direction of the Shipping Controller. It appears to me that the consequent loss of 6198*l.* was directly attributable to the directions which he gave. Except so far as it might affect the quantum of

loss or damage, it is immaterial whether the *Aberlour* was hired or owned by the appellants, so long as the vessel was in fact being used as part of the equipment of the business of the appellants, and such use would have continued but for the direction to the owner. Machinery in situ, and being operated for business purposes, is not the less a part of the business stock or equipment that it has been found more convenient to hire it than to purchase it. It was urged on behalf of the respondents that the interference on which the appellants based their claim for loss of profit was not an interference with business, but only with contractual rights, and that to award compensation for interference with contractual rights would be to misconstrue the terms of the Indemnity Act. This may be so, but the appellants were not dependent on the enforcement of contractual rights against the owner of the *Aberlour*; they had the use of the vessel and were using it for the purposes of their business, when it was withdrawn under the direction of the Shipping Controller. No doubt the question of remoteness of loss is a question of law, but I cannot come to any other conclusion than that the withdrawal of a vessel actually engaged in a trade cannot be regarded as a too remote cause of the loss of profit which the appellants suffered, and that there is no ground for rejecting the finding of the tribunal under this head. The further point raised in the judgment of Scrutton L.J., that the loss resulted from the fact that it was not profitable to employ another ship in the business because of high rates charged for ships owing to the war, does not appear to have been raised before the tribunal and was not pressed in this House. I doubt whether it could have been raised after the 6198*l.* had been accepted as an agreed amount.

The sum of 14,758*l.* 16*s.* 10*d.*, loss of hire, stands on a different footing. It is not a direct loss from a direct and particular interference with the business of the appellants, but a loss incurred in the voyage to Cuba, a voyage outside the business of the appellants. The loss falls upon the appellants as a consequence of para. 32 of the terms of the charter-party, in which they undertook to bear this loss as between

H. L. (E.) 1923 — Moss Steamship Co. v. Board of Trade.

themselves and the owners. In truth the total loss attributable to interference with the business of the appellants is included in the sum of 6198*l.*, and no further claim is maintainable.

The result is that the appeal should be allowed, and that the award should stand for 6198*l.* and be dismissed as regards the sum of 14,758*l.* 16*s.* 10*d.*

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Nov. 23, 1923.

Solicitors for the appellants: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitor for the respondents: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.* 1923 — *Oct.* 18.

SIR ALEXANDRE LACOSTE and Others Appellants;

and

DAME MARY M. DUCHESNAY . . . Respondent.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR QUEBEC (APPEAL SIDE).

Canada (Quebec)—Will—Partition of Testator's Property—Intention of Testator—Construction of Will—Civil Code of Quebec, art. 689.

By art. 689 of the Civil Code of Quebec: "No one can be compelled to remain in undivided ownership; a partition may always be demanded notwithstanding any prohibition or agreement to the contrary. It may, however, be agreed or ordered that the partition shall be deferred during a limited time, if there be any reason of utility which justifies the delay."

The above article does not require that partition of the property of a testator must be decreed notwithstanding the terms of the will. Where, as in the present case, property is given by the will to trustees for investment, and the trustees are required to pay the income derived therefrom to designated persons during a limited period, art. 689

* *Present:* Viscount Haldane, Lord Sumner, and Mr. Justice Duff.

does not entitle one of the ultimate beneficiaries to whom the corpus of the estate is given to insist upon a partition which would defeat the intention expressed by the will as to the disposition of the income.

Judgment of the Court of King's Bench reversed.

APPEAL (No. 66 of 1923) from a judgment of the Court of King's Bench for Quebec, Appeal Side (March 1, 1923), affirming a judgment of the Superior Court (February 21, 1922).

The action was brought in the Superior Court by the respondent against the appellants, the executors of the will of the Hon. Charles Wilson, other necessary parties being mis-en-cause. The sole question was whether upon the true construction of the will of the deceased, and having regard to art. 689 of the Civil Code, which is set out in the headnote, the respondent as one of the heirs was entitled to claim partition of the estate. The executors contended that the time fixed by the testator for the partition had not arrived.

The material terms of the will and codicils appear from the judgment of the Judicial Committee.

The trial judge (Surveyer J.) gave judgment for the plaintiff and ordered the executors to render an account of their administration, to put aside sufficient funds to secure the payment of the annuities to the surviving usufructuary legatees, and to divide the residue of the estate according to law, reserving for a later adjudication to determine as to the share of each individual legatee.

An appeal to the Court of King's Bench (Appeal Side) was dismissed by a majority (Guerin, Flynn, and Bernier JJ.; Tellier and Howard JJ. dissenting). The reasons of the learned judges appear from the judgment of the Judicial Committee.

1923. July 6, 9. *Clauson K.C.*, *H. Gérin Lajoie K.C.* and *Hon. Geoffrey Lawrence* for the appellant.

Lafleur K.C. and *J. P. Lanctot* for the respondent.

Oct. 18. The judgment of their Lordships was delivered by

MR. JUSTICE DUFF. The appellants are the executors of the will of the Honourable Charles Wilson, who died at

J. C. 1923 LACOSTE v. DUCHESNAY.

Montreal on May 21, 1877, and the respondent was the plaintiff in the action out of which the appeal arises, an action claiming immediate partition of the estate. The question involved in the appeal concerns the construction and the effect of the will, and stated in general terms, is whether the plaintiff is entitled to immediate partition of the estate among the present members of the class of persons eventually entitled to share in it, of which the plaintiff is admittedly one.

There is no dispute as to the facts. The will, which is in authentic form, is dated June 15, 1875, and there are two codicils dated December 1, 1876, and December 6, 1876, respectively. By art. 2 executors are appointed, and the whole of the testator's estate is vested in them in trust for the purposes of the will. By art. 3 the testator's widow receives the income arising from the estate during her life, subject to certain conditions not here material. By art. 4 the testator's niece, Margaret Wilson (Madame Duchesnay), receives, after the death of the testator's widow, an annuity of $6000; and the article further provides for the devolution of this annuity in these words: "And from and after the death of the said Margaret Wilson if there be no issue of her subsequent marriage, the said annuity of six thousand dollars shall devolve and continue to be paid to her children, issue of her marriage with the said Lieutenant-Colonel Duchesnay in equal shares among them during their natural lives, and in the same manner; and in case of the death of any of such children the share of such deceased child shall devolve to and continue to be paid in the same manner to his or her children, Margaret Wilson's grandchildren by representations of their deceased parent, until the final division of my estate, and in default of such grandchildren, then to such of the children, issue of the first marriage of the said Margaret Wilson, that shall be then living and to their children, to be divided between them, par souches. And in the case of the death of all such children and grandchildren, without issue before the final division of my estate, then the present legacy shall devolve and revert for

two-thirds to my said niece, Anna Maria Wilson, and for one-third to my late brother, Edward Wilson's children, and shall be considered as forming part of the annuity and legacy hereafter given to them."

By arts. 5 and 6, as amended by the first codicil, annuities of $6000 and $3000 are given to Anna Maria Wilson, wife of Louis Masson, and to the children of the testator's brother, Edward Wilson, respectively; and there are provisions as to devolution similar to that in art. 4 and for remainders, in art. 5, in favour of the beneficiaries under the legacies to Margaret Wilson and the children of Edward Wilson respectively, and in art. 6 in favour of the beneficiaries under the legacies to Margaret Wilson and Anna Maria Wilson respectively.

Art. 8 provides for fixed annuities in favour of certain other designated persons. Art. 11 is in these words: "After full payment of the above bequeathed annual sums, legacies and annuities and the said legacies d'une fois payés, if there remain in the hands of my executors any balance or residue of the revenue of my estate, I will and order that such residue devolve and belong to my said nieces, Margaret Wilson and Anna Maria Wilson and the children of my said brother, Edward Wilson and their children, and grandchildren hereinbefore designated, and be added to and increase their respective annuities in the same manner and in the proportions of their respective legacies respectively."

Art. 16 (as amended by the first codicil) is as follows: "I hereby give and devise to the grandchildren of my said niece, Margaret Wilson, issue of her marriage with the late Lieutenant-Colonel Duchesnay, of my said niece, Anna Maria Wilson, and of my said brother, Edward Wilson, designated in Articles four five and six of this my will, the whole of my estate, real and personal, moveable and immoveable, and all my property whatsoever, to be by them owned and held in full ownership, and to be divided among them as follows: four-tenths to the said grandchildren of my said niece, Margaret Wilson; four-tenths to the said grandchildren of my said niece, Anna Maria Wilson; and two-tenths to

J. C. 1923 LACOSTE v. DUCHESNAY.

the said grandchildren of my said brother Edward Wilson . . . ." [Here follow provisions for cross-remainders among the three families.] "But the said grandchildren shall not, however, enter upon their respective shares in said ownership until they attain the age of majority respectively, and until that time they shall enjoy or continue to enjoy the revenue or annuity of their deceased parent. The present donation in ownership is subject, however, to all the annuities and legacies in this will given and my said universal legatees in this article designated shall not take their legacies until such time as my executors have provided for or laid by a sufficient sum for the annuities which shall be then still payable; but out of the share of the grandchildren of the said Margaret Wilson, issue of her marriage with the late Lieutenant-Colonel Duchesnay, there shall be paid to the grandchildren of the said Margaret Wilson, issue of her second or any subsequent marriage at their age of majority a sum of twenty thousand dollars to be divided equally among them par souches."

Anna Maria Wilson died on November 15, 1912, without issue, and the annuity bequeathed to her by art. 5 has consequently gone to augment the shares of the families of Margaret Wilson and Edward Wilson. Margaret Wilson died on July 19, 1911, and of her children one son and four daughters are still living, all having children, and one son has died leaving children surviving, of whom one is the respondent in this appeal. Edward Wilson was dead at the date of the will, five children having survived him, three sons and two daughters. One of the sons, now dead, left three children, all still living. One son died without issue. The third son and both daughters are still alive and have no issue.

The action was commenced on May 12, 1921, by the respondent, Mary Margaret Duchesnay, demanding partition of the estate and payment of her share of it. The learned judge of the Superior Court granted the relief claimed, the principal considérant of the formal judgment being as follows: "Considérant que les mis-en-cause n'ont pas prouvé que le testateur eut ordonné (C.C. 689) que le partage définitif

de sa succession n'eut lieu qu'aprés la mort du dernier de ses petits neveux ; qu'une intention du testateur à cet effet ne serait pas suffisante, mais qu'il faudrait un commandement positif ; que même cette intention n'apparait pas assez clairement pour étre invoquée à l'encontre d'un texte d'ordre public."

In the Court of King's Bench the judgment of the Superior Court was confirmed and the appeal of the present appellants dismissed, Tellier and Howard JJ. dissenting. Guerin J. rejected the contention of the appellants that they must remain in possession of the estate until the final partition on the ground that such possession might in this view last for a further fifty years, a result which the testator could hardly have contemplated ; he thought the possibility of the death of all the descendants in one branch or of further births need not be seriously discussed as restitution could always be claimed from those who had received too much ; and that the principle "voluntas habet interpretationem latam et benignam" should be applied, and, as a partial partition is not prohibited by the will or by law, it should be ordered. Flynn J. thought that the combined effect of art. 689 of the Civil Code and the terms of the will, and in particular of art. 16, was to give the descendants who were the légataires universels the right to demand partition when they respectively came of age ; that the existence of a usufruct in favour of the beneficiaries of the annuities was not in law an objection to a judgment for final partition ; that the only partition contemplated by the testator was a final partition and the only condition imposed is the continued payment of the annuities ; that the objection of the appellants founded upon the possibility of future grandchildren is not one with which the Court should concern itself in the absence of any evidence on the subject at the trial ; and that the judgment appealed from should be upheld as a judgment for final partition. Bernier J. considered that the only conditions of the right to final partition are, (*a*) that the descendant claiming partition shall be of age ; and (*b*) that his or her parent shall be dead. Tellier J., with

J. C. 1923 LACOSTE v. DUCHESNAY.

whom Howard J. concurred, came to the conclusion that this action was not maintainable. His view was that after the death of the widow the children and grandchildren of Margaret and Edward Wilson were by art. 11 made residuary legatees of any surplus income derived from the estate after the payment of the fixed annuities, and that as this surplus is only calculated annually after the payment of these annuities, and is to be added to the fixed annuities given to the residuary legatees, the surplus is intended to be distributable during the whole of the period in which any part of these fixed annuities remains payable; as these annuities are expressly made payable for the term of the natural lives of the children of Margaret and Edward Wilson, the surplus is clearly distributable during the same period; that the present partition of the estate, even though a sufficient sum were set aside to pay the outstanding fixed annuities, would inevitably deprive some of the residuary legatees of their interest in this surplus; that it was for this reason that the testator by art. 17 gave to his executors the power to administer the whole of his estate until the final execution of the will, and the executors are bound so to do and to distribute the surplus in accordance with the directions of the will until the death of all the children of Margaret Wilson and Edward Wilson; that art. 689 of the Civil Code does not apply, since until the death of the last of such children the legacy of which the respondent demands her share is not free; that a provisional partition would deprive the appellants of possession and thereby make it impossible for them to perform their trust; that the provision of art. 16 that: "the said grandchildren shall not, however, enter upon their respective shares in said ownership until they attain the age of majority respectively, and until that time they shall enjoy or continue to enjoy the revenue or annuity of their deceased parent," does not give the grandchildren a right to claim partition at their majority, but merely provides that if any grandchildren are still minors at the time of the final partition the executors shall retain their share in their hands until their majority; that the reference to "their deceased

parent" in the passage last quoted indicates that in the contemplation of the testator all the parents will be dead before the final partition takes place; that the words "annuities which shall be then still payable" in the last paragraph of art. 16 are referable to the annuities provided for in art. 8; and that the testator expressly enjoins that art. 16 is not to overrule the rest of the will.

At their Lordships' Board counsel for the respondent argued that the testator had by art. 16 explicitly declared that the "grandchildren" designated by that article should at "their age of majority" enter upon the ownership of their respective shares in the estate; and that as regards "grandchildren" who might thereafter be born, the "grandchildren" who had received their shares would be institutes in favour of these, who themselves would be substitutes. There is, it is said, a tacit substitution in favour of "grandchildren" to be born. It follows, it is contended, that any grandchild on attaining his or her majority is entitled to demand a definitive partition. As regards annuities, the existence of the usufructuary right of the annuitants, it is contended on the authority of Pothier (vol. vii., p. 563, ed. 1827, Dupin), is no impediment to a definitive partition, and, moreover, art. 16, it is said, makes provision in respect of the annuities payable under arts. 4, 5 and 6 in directing the executors to set aside a sufficient sum to secure the payment of them. This direction it was contended has no application to the residuary income distributed by art. 11, the right to which it is said comes to an end on the partition of the estate, but applies to all other annuities granted by the testator.

The effect of arts. 4, 5, 6, 8, 9 and 11, which have already been sufficiently quoted or paraphrased is, their Lordships consider, that the whole of the net income derived from the estate is distributed among the beneficiaries named or otherwise designated by those articles. After the death of the testator's widow, the legacies d'une fois payer having been paid, the sums receivable by the beneficiaries entitled to share in the annuities payable under arts. 4, 5 and 6 become, by force of art. 11, proportionately enhanced as a

J. C. 1923 LACOSTE v. DUCHESNAY.

result of the distribution of the residuary income among these beneficiaries.

As the life annuities provided for by art. 8 come to an end, and as the income of the estate increases, the amount of the surplus income distributable under art. 11 is, of course, correspondingly augmented; and their Lordships think it sufficiently clear that the will contemplates the distribution of the whole of this augmented surplus in enhancement of the sums payable to the beneficiaries entitled to share in the annuities given by arts. 4, 5 and 6. The language of art. 11 by which the residue "shall devolve and belong to my nieces Margaret Wilson, Anna Maria Wilson, and the children of my said brother Edward Wilson, and the children and grandchildren hereinbefore designated and be added to and increased, the respective annuities in the same manner and in the proportion of their respective legacies respectively," does not appear to be open to any other interpretation. So long, therefore, as any one of the children of Margaret Wilson or of Edward Wilson remains alive that child is entitled to his or her proportionate share (as determined by the dispositions of arts. 4, 5 and 6) in the whole net revenue of the estate after provision has been made for the fixed annuities given by other clauses of the will.

Since it is the whole of the net revenue which is thus dealt with by the will, and since by art. 2 it is the whole of the estate which is vested in the fiduciary universal legatees and their successors in trust for the purposes of the will, "to be by them administered, dealt with, converted, invested, used and disposed of as hereinafter expressed, concerning same," it would appear to follow that unless there be some provision in the will or some consideration to be derived from an examination of the testament as a whole or some rule of law which has the effect of qualifying the primary meaning of these provisions governing the application of this income, there cannot consistently with the due observance of them be a partition of the estate so long as any of such children remains alive.

It is art. 16 upon which the respondent relies as the

governing provision. But that article does not, as it appears to their Lordships, disclose the intention ascribed to the testator by the respondent's argument that any grandchild within the class entitled under it shall, on attaining his or her majority, " enter upon the ownership " of his or her share ascertained by reference to the number and rights of the members of the class then in being. This view fails, they think, to recognize the bearing and weight of parts of art. 16, which cannot be disregarded, and of the second paragraph especially.

That paragraph explicitly declares that the gift of the corpus " is subject to all the annuities and legacies in this will given," a declaration which seems clearly enough to manifest an intention that the gift of the corpus shall not operate in such a way as to prevent the trustees executing the trust for investment and the directions for the disposition of the income of the estate found in the earlier paragraphs of the will. Nor does it appear that this declaration is affected by the second branch of the sentence ; for the words " until such time as my executors have provided for or laid by a sufficient sum for the annuities which shall then be still payable " are words which do not appear to contemplate a provision for securing annual payments of unascertained amount (aliquot shares of the whole net income), but seem more appropriate in relation to annuities of fixed and ascertained amounts.

This indeed was not controverted in the argument before their Lordships' Board. But it was contended, as already mentioned, that this direction, while it requires provision to be made for the annuities given to Margaret Wilson, Anna Maria Wilson and the children of Edward Wilson, has no reference to the residuary revenue disposed of by art. 11.

As already observed, their Lordships think the residuary revenue under art. 11 goes by force of that article to enhance the annuities last mentioned, and they consider that no distinction is possible for the purpose of applying this clause of art. 16 between the share of a beneficiary in any of the fixed annual sums bequeathed by arts. 4, 5 and 6 and the share

J. C. 1923 LACOSTE v. DUCHESNAY.

devolving upon the same beneficiary in the residuary revenue under the distribution directed by art. 11; and their Lordships' opinion is that this clause does not contemplate provision for the annuities arising under arts. 4, 5 and 6, but that it is most naturally construed as making provision for those given by art. 8. Their Lordships accordingly agree with the view of Tellier and Howard JJ. that the right to immediate partition claimed by the respondent and conceded to her by the Courts of Quebec cannot be maintained consistently with what their Lordships think is the undoubted right of the annuitants, the children of Margaret Wilson and of Edward Wilson, to enjoy their respective shares in this surplus during their lives.

Their Lordships are unable to accept the view expressed in the considérant quoted from the formal judgment of Surveyer J. that art. 689 of the Civil Code contains a disposition to which effect must be given by decreeing partition notwithstanding the terms of the will. The provisions of the articles of the Civil Code beginning with art. 981A (which did not in any sense alter the law as declared by the Code under the heads of "Legacies" and "Testamentary Executors") are unquestionably sufficient to enable testators to provide effectively for the vesting of their estates in trustees as depositaries and administrators for the purposes of the trust and for the benefit of the legatees designated by the testator and to empower such trustees to retain the property for the "time stipulated for the duration of the trust," and to administer the property during that time for the purposes of the trust "without the intervention of the beneficiaries." Their Lordships can entertain no doubt that where, as in this case, property is given to trustees for investment, and the trustees are required to pay the income derived therefrom to designated persons during a limited period, there is nothing in the article relied upon entitling one of the ultimate beneficiaries to whom the corpus of the estate is given to insist upon a partition which would defeat the intention expressed by the will as to the disposition of the income.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the action dismissed. The costs of the appellants and of the respondent to be taxed as between solicitor and client in the Privy Council, and the costs of all necessary parties in the Courts below are to be paid out of the estate.

J. C. 1923 LACOSTE v. DUCHESNAY.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.* 1923 *Nov.* 16.

EASTERN SHIPPING COMPANY, LIMITED . . . . . } APPELLANTS;

AND

QUAH BENG KEE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF PENANG).

Third-party Procedure—Indemnity—Principal and Agent—Liability of Principal due to Agent's Breach of Duty—Code of Civil Procedure, 1907 (*Straits Settlements*), *s.* 158.

Though a right of indemnity generally arises by contract, express or implied, it exists whenever the relation between parties is such that either in law or in equity there is an obligation upon one party to indemnify the other.

The owners of a wharf granted the appellant company the right to berth their ships at it subject to payment and liability for any damage caused. The respondent, who was managing director of the appellant company, gave instructions, without the company's authority, that a ship which he himself had chartered for his own benefit should berth at the wharf. Owing to the unskilful way in which the ship was unloaded the wharf collapsed. In an action by the owners of the wharf against the appellant company for damages, they served a third-party notice upon the respondent, and claimed that he should indemnify them against any damages for which they should be held liable. By the rules of Court applicable (as by R. S. C., Order XVI., r. 48) third-party procedure is

* *Present:* LORD ATKINSON, LORD SHAW, LORD WRENBURY, LORD CARSON, and SIR ROBERT YOUNGER.

J. C.
1923
EASTERN SHIPPING CO. v. QUAH BENG KEE.

available " where a defendant claims to be entitled to contribution or indemnity over against a person " :—

Held, that the appellant company had a right of indemnity against the respondent, and were entitled to join him as a third party and obtain relief against him.

Judgment of the Supreme Court reversed.

APPEAL (No. 37 of 1923) from a judgment (November 22, 1922) of the Supreme Court of the Straits Settlements (Settlement of Penang) affirming a judgment of a judge of that Court.

The appeal arose in an action brought in the above Court by the Peninsular and Oriental Steam Navigation Company against the appellants for damage to a wharf in Sumatra. The question upon the appeal was whether in the circumstances stated in the judgment of the Judicial Committee the appellants as defendants could serve a third-party notice upon the respondent and obtain relief against him.

The Civil Procedure Code, 1907, of the Straits Settlements, by s. 158, sub-s. 1, provides that " where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may by leave of the Court or a judge, issue a notice, hereinafter called a third-party notice, to that effect. . . . . " By s. 162 : " (1.) If a third party appears pursuant to the third-party notice, the defendant giving the notice may apply to the Court or a judge for directions. (2.) The Court or judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving notice, to be tried in such manner, at or after the trial of the action, as the Court or judge directs."

The trial judge (Whitley J.) held that the appellants were liable in damages to the plaintiffs, and that although the appellants had a right in damages against the respondent, the right did not support a claim to an indemnity so as to render s. 158 applicable.

The appellate Court (Sproule A.C.J., and Brown J.; Barrett-Lennard J. dissenting) affirmed the judgment of Whitley J.

1923. Oct. 23, 25. *Upjohn K.C.* and *Simey* for the appellants. The appellants had a right of indemnity against the respondent, and were entitled to relief against him by third-party procedure. There may be a right of indemnity although there exists no contract, either express or implied, to indemnify. That appears clearly from the judgment of Bowen L.J. in *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (1) The respondent used the wharf for his own benefit, but purporting to act as managing director. A right of indemnity arises where from the mode of enjoyment of a person's property a burden is cast upon him. Further, the respondent could not properly have allowed anybody to use the wharf without requiring on behalf of the appellants an indemnity; having used it for his own benefit he cannot be heard to say that he was not under a similar liability. [Reference was made also to *Waring* v. *Ward* (2); *Wolveridge* v. *Steward* (3); and *Hardoon* v. *Belilios.* (4)

Hon. Sir Malcolm Macnaghten K.C. and *Giveen* for the respondent. A right to an indemnity to entitle a defendant to relief by third-party procedure in respect of damages arises only by contract, express or implied. It is not material that the defendant has a right to recover damages against a third person, and the measure of those damages is the same as that in the action brought against the defendant: *Speller & Co.* v. *Bristol Steam Navigation Co.* (5); *Constantine & Co.* v. *Warden & Sons.* (6) It is conceded that, as was stated in *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (7), there may be in equity a right of indemnity independent of contract, but a right independent of contract has never been held to entitle a defendant in an action for

(1) (1886) 34 Ch. D. 261, 274.
(2) (1802) 7 Ves. 332, 337.
(3) (1833) 1 Cr. & M. 644.
(4) [1901] A. C. 118.
(5) (1884) 13 Q. B. D. 96, 101.
(6) (1895) 73 L. T. 450.
(7) 34 Ch. D. 261, 274.

J. C. 1923 — EASTERN SHIPPING CO. v. QUAH BENG KEE.

damages to join a third party and obtain relief against him in the action. Actions arising out of agents improperly pledging their principal's credit are common, but there is no precedent for a principal when sued in those circumstances obtaining leave to join his agent as a third party. The observations of Bowen L.J. in the case last mentioned had reference to the duty of a cestui que trust to indemnify his trustee. Even if there was a fiduciary relationship between the parties, here it is the person in the position of trustee who is called upon to indemnify his cestui que trust. It is significant that s. 158, like R. S. C., Order XVI., r. 48, omits the words "or other remedy or relief," which followed the word "indemnity" in R. S. C. 1875, Order XVI., r. 18. [Reference was made also to *Johnston* v. *Salvage Association*. (1)

Upjohn K.C. replied.

Nov. 16. The judgment of their Lordships was delivered by

LORD WRENBURY. The facts in this case are simple and before their Lordships neither are, nor can be, disputed.

The Peninsular and Oriental Steam Navigation Company were owners of a wharf at Belawan in Sumatra. They granted to the Eastern Shipping Company a right to berth their ships at the wharf upon terms which included terms that the latter should pay 100 guilders a day for every day of twenty-four hours, and that all damages which might be brought about by the berthing of their steamers at the wharf should be made good by them. Quah Beng Kee was managing director of the Eastern Shipping Company. Slot & Co. were the shipping agents of that company. Beng Kee, who had control of the business of the Eastern Shipping Company and was entitled, as managing director, to berth at the wharf ships of the Eastern Shipping Company, appointed Slot & Co. as his own agents at Belawan as charterer of a ship called the *Kamakata Maru*, and instructed them to berth that ship at the wharf in question. The *Kamakata Maru* was a ship in which Beng Kee was, and the Eastern Shipping Company were not, in any way, interested. Beng

(1) (1887) 19 Q. B. D. 458.

Kee's instructions to berth this ship at the wharf were wholly unauthorized, and were in breach of his duty to the Eastern Shipping Company. Owing to unskilful unloading excessive weight was put upon the wharf and it collapsed. Damage was thus occasioned which the P. & O. Company were under their grant to the Eastern Shipping Company entitled to recover. They brought their action against the Eastern Shipping Company; the latter brought in Beng Kee under third-party procedure and obtained an order on January 6, 1919, to the effect that Beng Kee should be at liberty to defend and to appear at the trial and should be bound by the judgment, and that he might raise points of defence not raised by the Eastern Shipping Company, and that he should deliver his defence to the claim for indemnity raised by the Eastern Shipping Company, and that the question of his liability to indemnify should be tried at or immediately after the trial of the action.

Beng Kee appeared and pleaded and appeared at the trial of the action, and in his presence the P. & O. Company established their case and recovered damages to the extent of $79,860. The trial judge found that the acts of Beng Kee were within the apparent scope of Beng Kee's authority, and upon that ground held the Eastern Shipping Company to be liable, and he reached the same conclusion upon another ground—namely, that by a letter of August 28, 1918, the Eastern Shipping Company had ratified and accepted responsibility for the acts of Beng Kee in the matter. This was a letter signed "H. Oxenham, Manager." The trial judge found as a fact that this was in reality Beng Kee's letter written and sent by H. Oxenham by his instructions. The result of that letter was that Beng Kee thereby raised an additional ground for throwing upon his principals a burden which Beng Kee ought himself to have discharged.

After trial of the action the trial judge proceeded to try the third-party issues, and upon the evidence arrived at findings which are summarized in the appellants' case as follows: (7.) That instructions to use the wharf purported to be given by Quah Beng Kee as managing director of the

J. C. 1923 EASTERN SHIPPING CO. v. QUAH BENG KEE.

defendant company. (8.) That the instructions for the berthing were given by Quah Beng Kee in his own interest and not in the interest of the defendant company. (9.) That Quah Beng Kee stood in a fiduciary relationship to the defendant company; and (10.) That he unjustifiably used his position in the defendant company for his own benefit, and so was guilty of a clear breach of duty towards them. These findings were justified by the evidence and are binding upon the parties.

The trial judge, however, found that the defendants, the Eastern Shipping Company, had no right of indemnity against Quah Beng Kee, and inasmuch as under third-party procedure relief can be given against a third party only in cases where the defendant has against the third party a direct right of indemnity, the proceedings against Quah Beng Kee failed. An appeal from this order was dismissed with costs.

It was not disputed before their Lordships that in proceedings otherwise constituted Quah Beng Kee on the above findings would have been liable. The present appeal by the Eastern Shipping Company is of the greater importance to the parties by reason of the fact that an action by the Eastern Shipping Company against Beng Kee for damages is now barred by the Statute of Limitation, and unless he can be made liable in these proceedings his liability cannot be enforced at all.

The question for discussion is therefore whether upon the facts stated the appellants have as against Beng Kee a right of indemnity. There is no other question.

A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract; it may

(to give other instances) arise by statute ; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him ; it may arise (to use Lord Eldon's words in *Waring* v. *Ward* (1) ; a case of vendor and purchaser) in cases in which the Court will " independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation " of the vendor. These considerations were all dealt with by the Lords Justices in *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (2)

The question of indemnity commonly arises in the case in which a trustee claims to be indemnified by his cestui que trust. This class of case was particularly discussed by Lord Lindley in *Hardoon* v. *Belilios.* (3) The present case is the converse. The cestui que trust is here claiming to be indemnified by the trustee. Beng Kee has been found to stand in fiduciary relation to the Eastern Shipping Company, and the latter claim indemnity from him in respect of liability imposed upon them by his abuse of powers in the exercise of which he owed them a duty and was responsible as a trustee of those powers. He was not a trustee in the full sense of that word. No property was vested in him. But he was a trustee of his powers in the sense that they were vested in him in such manner that he stood in a fiduciary relation to the company in respect of his exercise of those powers. The nearest simile that was put in argument was that of a trustee in the fullest sense of the word who abuses his powers ; say, the trustee of real estate with power to mortgage who mortgages for his own benefit and in breach of his duty as trustee and puts the mortgage money into his own pocket. In such a case an action would lie in the Chancery Division for a declaration that the defendant was guilty of breach of trust and was liable to indemnify the cestui que trust against the mortgage, and for an order that he do redeem

(1) 7 Ves. 332, 336. (2) 34 Ch. D. 261.
(3) [1901] A. C. 118.

J. C. 1923

EASTERN SHIPPING CO. v. QUAH BENG KEE.

the mortgaged property and indemnify the cestui que trust against the mortgage debt.

In the present case, suppose that it would have taken, say, a month to discharge the *Kamakata Maru* at the wharf and that the Eastern Shipping Company had learned, say, three days after the ship was berthed that the breach of duty had been committed, an action would have lain to restrain the defendant from continuing the ship at the berth and for an order that he do indemnify the plaintiffs against the three days' rental that had been incurred.

In their Lordships' opinion these results follow from the following considerations. If Beng Kee as managing director had been granting to a third party the right to berth a ship at the wharf it would have been his duty to his principals to stipulate that the third party should accept the burden which would be cast upon his principals by the user of the wharf. What happened was that Beng Kee as managing director gave to himself, as charterer of the ship, the user of the wharf. He cannot be heard to say that in so doing he did not, as managing director, require from himself as charterer of the ship the same promise as that which it would have been his duty to require from a third party—namely, a promise that he would indemnify his principals against the consequences of his act. In other words, the relations between the parties were such that the law implies the promise which it was his duty to make, and from this arises a right of indemnity. Upon these grounds their Lordships are of opinion that this appeal succeeds.

There should be a declaration that Quah Beng Kee is liable to indemnify the Eastern Shipping Company against or to repay to them the damages awarded to the P. & O. Company by the order made in the action as well as all costs ordered to be paid by them in the several orders for costs made in the action and in the third-party proceedings, and is liable to pay to the Eastern Shipping Company the costs incurred by them in the action and in the third-party proceedings, the costs incurred by them in the action to be taxed as between solicitor and client, but having regard to

the fact that they are payable by the third party, and an order to give effect to that declaration. The respondent must pay the costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Nisbet, Drew & Loughborough.*
Solicitors for respondent: *Cardew, Smith & Ross.*

[PRIVY COUNCIL.]

J. C.* 1923 *Nov.* 22

SHANNON REALTIES, LIMITED . . APPELLANTS;

AND

VILLE DE ST. MICHEL . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Quebec)—Municipal Valuation Roll—Action to set aside Roll—Supervising Control of Superior Court—Statutory Means of Relief—R. S. Q., 1909, *arts.* 5705, 5706, 5715—*Code of Civil Procedure (Quebec), art.* 50.

A person aggrieved by a municipal valuation roll made under the Cities and Towns Act, 1903 (3 Edw. 7, c. 38; R. S. Q., 1909, Tit. XI.), has a right of complaint to the municipal council under art. 5705 (R. S. Q., 1909) within thirty days of the deposit of the roll, with a right of appeal to the Circuit Court under art. 5715; he has not the right (save possibly in the case of fraud) to bring an action in the Superior Court to set aside the valuation roll under the supervising power given to that Court by art. 50 of the Code of Civil Procedure.

Where in the collection roll land under cultivation has been taxed at the full value entered in valuation roll, instead of at one-fourth of that value as provided by statute, that does not form a ground for impeaching the roll, but is merely a contention available in answer to a claim for the tax.

Judgment of the Supreme Court affirmed.

APPEAL (No. 115 of 1922) by special leave from a judgment (October 10, 1922) of the Supreme Court of Canada (1)

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD ATKINSON, LORD SHAW, and LORD SUMNER.

(1) 64 Can. S. C. R. 420.

J. C. 1923

SHANNON REALTIES v. ST. MICHEL (VILLE DE).

reversing a judgment of the Court of King's Bench (Appeal Side) for the Province, which affirmed a judgment of the Superior Court.

The action was brought in 1920 by the appellants against the respondent town in the Superior Court of Quebec. By their declaration they alleged that during each of the years 1913, 1914, 1915, 1916, 1918, 1919, their property had been "land under cultivation," within the meaning of s. 28 of the respondent's charter; that in the assessment of its property the respondent had disregarded the provisions of that section; that the respondent had grossly overvalued the said property as well as all the properties generally within its territory; and they prayed that the assessment rolls for all the above years, and the collection rolls based thereon, be held illegal, irregular, null and ultra vires and be quashed and annulled. The respondents by their defence pleaded (inter alia) that the land did not come within s. 28 of the charters, and that the valuation had been made in accordance with prices prevailing generally and with the value attributed to the properties by the appellants themselves; and that the action was irregular and belated, and not maintainable.

The facts appear from the judgment of the Judicial Committee.

At the trial the case was abandoned as to the years 1913 and 1914, but as to the other years mentioned the trial judge (McLennan J.) declared the valuation and collection rolls null and void. In the opinion of the learned judge the valuation was fictitious, and the assessors had so disregarded the real value as to have exceeded their powers; he also found that the assessors had disregarded the statutory provisions as to "land under cultivation" or "farmed."

On appeal to the Court of King's Bench (Appeal Side) the judgment was affirmed by Lamothe C.J., Martin and Guerin JJ.; Allard and Rivard JJ. dissenting.

Upon a further appeal to the Supreme Court of Canada that Court (Davies C.J., Idington, Duff and Brodeur JJ.; Anglin and Mignault JJ. dissenting) reversed the judgment of the Appeal Side. The majority were of opinion that the

valuations could not be regarded as incompetent under the Cities and Towns Act, and that as that Act provided a remedy for an aggrieved owner he could not avail himself of the supervising power of the Superior Court under s. 50 of the Code of Civil Procedure, in the absence of fraud. The appeal to the Supreme Court is reported at 64 Can. S. C. R. 420.

1923. July 16, 17. *Clauson K.C.* and *Hon. Geoffrey Lawrence* for the appellants. (1)

L. E. Beaulieu K.C. and *T. Mathew* for the respondents.

[Reference was made to the statutory provisions set out in the judgment, and to *Déchéne* v. *Montreal* (*City*) (2); *St. Boniface* (*Archbishop*) v. *Transcona* (*Town*) (3); *C. and E. Townsites, Ld.* v. *Wetaskiwin* (*City*) (4); and *Wiseman* v. *Montreal* (*City*). (5)]

Nov. 22. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. The true question in these appeals has reference to a provision in the Code of Civil Procedure for Quebec (60 Vict. c. 48, as re-enacted by 10 Geo. 5, c. 79). That provision is art. 50, and is to the following effect: "Excepting the Court of King's Bench, all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the Province, order are subject to the superintending and reforming power, and control of the Superior Court and of the judges thereof in such manner and form as by law provided."

The appellants maintained that they were entitled to certain remedies under that section. The respondents answered that the appellants are precluded from having recourse to it, there being provisions at law for regular appeal which were open to them, and of which they had not availed themselves. The respondents further maintained that in

(1) An appeal (*Pesant and Another* v. *La Ville de St. Michel*) was argued together with that here reported and *Lafleur K.C.* for the appellants was heard.

(2) [1894] A. C. 640.
(3) (1917) 56 Can. S. C. R. 56.
(4) (1919) 59 Can. S. C. R. 578.
(5) (1921) Q. R. 60 S. C. 284.

J. C. 1923 SHANNON REALTIES v. ST. MICHEL (VILLE DE).

any view recourse should not be had to art. 50 except in the case where the proceedings of valuation challenged, performed by the Corporation of the town of St. Michel, or its valuations had been tainted by fraud.

The narrative of facts and statutory provisions, now to be given, is confined to those which are relevant to the true issue in the case as above stated—namely, that upon the scope and application of art. 50.

La Ville de St. Michel was erected in 1915 by an Act passed by the Legislature of Quebec, into a town corporation to be governed by the Cities and Towns Act. It is in the neighbourhood of Montreal; and it appears to be clear that in or about the years 1913–14 there were high expectations of ground (then being held as farm land) rising greatly in value on account of its suitability as building sites.

In May, 1914, the appellants, a company dealing in real estate, acquired a tract of land in the municipality measuring 84 arpents, sub-divided into over 900 building plots. The price paid was about $2500 per arpent, and in that year (1914) 6 arpents were sold at a rate of about $3000 per arpent. The valuation put in the years 1915 and 1916 upon the land was $6000 per acre of capital value. In 1917 this valuation was repeated, and it was appealed against to the Circuit Court under the provisions to be afterwards cited, and was reduced to $500.

Two circumstances thereafter remained unexplained in these proceedings. First, that in the succeeding year the valuation was again increased to $6000; and second, that, notwithstanding their conspicuous success in the year 1917, in reducing that large figure to one-twelfth of the amount—namely, $500—the appellants did not appeal against that valuation of $6000. It was allowed to stand without legal challenge, and it regulated the finance and taxation of the town for the year 1918. Instead of lodging an appeal they took these proceedings. These began on February 25, 1920, when the plaintiffs lodged their declaration with the Superior Court of Quebec, District of Montreal, concluding with a demand that the valuation and collection rolls for the years

1913, 1914, 1915, 1916, 1917 and 1919 should be declared to be, and set aside as, irregular and null and ultra vires.

It seems fairly clear that if a challenge of this kind, in all its breadth, was sanctioned, it would make municipal finance substantially uncertain, and would be productive of the greatest confusion. Whatever may have been the conduct of the municipality and its officers, it is not to be wondered at that the Courts below should have had serious difficulty in dealing with a legal demand of so extensive a scope.

By the Cities and Towns Act (Revised Statutes of Quebec, 1909) it is provided as follows :—

Art. 5696 : " The assessors shall each year, at the time and in the manner ordered by the Council, assess the taxable property of the municipality according to its real value."

By art. 5705 it is provided that the assessors shall deposit the valuation roll in the office of the Council, and that the roll shall remain open for examination for thirty days after its deposit.

Art. 5706 is as follows : " During such time, any person who, personally or as representing another person, deems himself aggrieved by the roll as drawn up, may appeal therefrom to the Council, by giving for that purpose a written notice to the clerk stating the grounds of his complaint."

Art. 5715 is as follows : " An appeal shall lie to the Circuit Court of the county or of the district or to the magistrate's court of the district : 1. From any decision of the Council upon a complaint under Article 5706, within thirty days from such decision ; or 2. Whenever the Council has neglected or refused to take cognizance of any written complaint made in virtue of Article 5706, within thirty days after the expiration of the delay within which it might have taken cognizance thereof." Subsequent provisions are made for the hearing of the case and the requisite procedure.

It was under arts. 5706 and 5715 that the appellants proceeded in the year 1917, when they were successful in obtaining the reduction of the valuation from $6000 to $500.

Art. 5724 provides for the case of an appellant who neglects effectually to prosecute the appeal. It is in the following

J. C. 1923 SHANNON REALTIES v. ST. MICHEL (VILLE DE).

terms: "Every appellant who neglects effectually to prosecute the appeal shall be deemed to have abandoned the same, and the court, on application by the respondent, may declare all the rights and claims founded on the said appeal forfeited with costs in favour of the respondent and order the transmission of the record to the municipality."

By art. 5730 it is provided that the Council may levy a tax of 2 per cent. of the real value as shown on the valuation roll, and by s. 5731 certain provisions were made as to farm lands. By 5 Geo. 5, c. 109, it was, however, replaced as follows: "All land under cultivation or farmed or used as pasture for live stock, as well as all uncleared land or wood lots within the municipality, shall be taxed, for a term of ten years, to an amount proportionate to one-fourth of its value as entered on the valuation roll, upon the condition that such proportionate amount shall not exceed one hundred and fifty dollars per acre, including the buildings thereon constructed."

One circumstance may be mentioned with regard to the last-named section, and the subject may then be passed from. It is established beyond all doubt that the land in question during all the years in question was in the occupation of a farmer named Scott. When the anticipation of the year 1914, as to the development of building enterprise, failed, certain pipeage had in fact been put underground and certain roads had been laid out or partially made, but these roads became overgrown and the pasturing and farming went on as before. It is, however, uncertain from the proceedings whether the respondents, the municipality, had treated or are prepared to treat this land as farm land in so far as having the statutory limitation of taxation under that category applied. What is the reason for this apparent failure to tax land under the express limitations of that statute does not appear, but the question, as will be afterwards shown, does not directly arise under these proceedings.

On the assumption that there is appealable matter, then it appears to their Lordships to be clear that so far as proceedings by way of appeal are concerned the specifications

of time must be respected. For an appeal to the Council a time of thirty days is given to the ratepayer, during which time the roll remains open for examination; and for an appeal to the Circuit Court, a further thirty days from the date of the Council's decision, or from the expiration of the time in which it might have taken cognizance of the appeal. These limits of time appear to their Lordships to be imperative; and the point has already been alluded to as to the importance of definite and final ascertainment of the state of the valuation roll each year as the basis both of individual taxation and municipal finance. This is secured by these express provisions and time limitations.

In all the years for which the valuation is challenged—namely, 1913–19—with the exception already mentioned of 1918, no appeal was entered nor were any other legal proceedings initiated. The valuation, taxation and finance of St. Michel and its ratepayers were accordingly regulated by the valuation which had thus attained statutory finality.

The question that remains accordingly is, whether art. 50 of the Code of Civil Procedure can now be invoked so as to have both the valuation rolls and the collection rolls for three past years declared in the language of this plaint to be and to have always been illegal, irregular and null, ultra vires, etc. This is a declaration of complete nullity—that is to say, nullity in every year and as to every taxpayer in every year. Not only the nature of this demand, but the breadth of it, have caused great differences of judicial opinion in the Courts below.

Allard J. illustrates the points thus: " Il est à présumer que tous les contribuables, moins la demanderesse, ont payé leurs taxes basées sur l'évaluation portée aux rôles attaqués. La preuve ne révèle pas que les propriétaires d'autres terres, anciennement en culture et qui ont été subdivisées en lots à bâtir, considèrent leur terre actuellement encore comme terre en culture, comme le fait la demanderesse. Rien ne prouve que ces propriétaires de lots subdivisés, autres que les demandeurs, ne sont pas satisfaits de l'évaluation que les estimateurs ont faite de leurs terres. Et l'on nous demande

J. C. 1923 SHANNON REALTIES v. ST. MICHEL (VILLE DE).

d'annuler les rôles faits en 1915, 1916, 1918 et 1919—rôles évaluant toutes les propriétés de la ville St. Michel."

The same learned judge subsequently adds: "Je ne puis admettre qu'avec le dossier, tel que fait, cette Cour soit justifiée d'annuler les rôles de perception quant à tous les autres habitants de la municipalité. Il est à présumer, et même je pourrais dire certain, que tous les municipes de St. Michel, y compris même les propriétaires de terrains subdivisés, à l'exception des demandeurs, ont payé les taxes qui leur sont imposées par les rôles attaqués. Il n'y a pas de doute, non plus, que les argents ainsi encaissés ont été dépensés par le Conseil pour frais d'administration et autres. Et voilà, que par notre décision nous dirions à ces gens: Vous avez payé vos taxes sans vous plaindre, nous n'avons pas de preuve que vos propriétés sont surévaluées, vous ne vous êtes jamais plaints, vous avez acceptés comme juste et raisonnable l'évaluation de vos propriétés respectives, mais la demanderesse ayant prouvé que sa terre est encore terre en culture et que pour cette raison le Conseil municipal l'a imposé à un montant trop élevé, nous allons annuler tous les rôles de perception pour 1915, 1916, 1918 et 1919. Ce serait, à mon avis jeter cette municipalité dans le chaos." And he concludes by declining a general annulment of the rolls, by favouring a remedy limited to an annulment of the entries applicable to the respondent, but apparently going back in his case over four past years.

It may illustrate the difference of opinion to cite Martin J. as follows: "It was urged that we ought not to annul these rolls as to persons and rate-payers not contesting and who might have paid the taxes imposed upon them thereunder, but if the rolls are illegal and ultra vires the powers of the corporation, they must be set aside regardless of consequences, and if their legality is limited to respondent's property, it would create inequality of taxation."

How shall such a wide difference be settled? Where the words of a statute are clear they must, of course, be followed; but, in their Lordships' opinion, where alternative constructions are equally open, that alternative is to be chosen

which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.

In this view it is of cardinal importance to consider what is the remedy provided for the situation in which a ratepayer or body of ratepayers has been put by a valuation roll which is said to be illegal and invalid by reason either of error in its particular items, or by reason of fundamental error in principle. Once such a roll appears, the statute steps in to provide a remedy to "every person who, personally or as representing another person, deems himself aggrieved by the roll as drawn up," and the appeal is to state "the grounds of his complaint." What the Act provides by way of the prescription of appeal is to give by that means a remedy for a grievance which is complained of. The Act demands—for otherwise municipal finance would fall into confusion—a statement and handling of the aggrieved person's case, and that within a period of thirty days, to the Council, and, if the grievance complained of be still not remedied, within another period of thirty days to the Circuit Court. Here is promptitude, and the saving of the finance of the year, by making secure the basis of it all—namely, the valuation roll. And then the statute by art. 5724 proceeds to provide that any appellant failing to prosecute effectually his appeal shall be deemed to have abandoned it and forfeited his rights under it. Thus negatively the precise and actual method of remedy given is confirmed.

It is in the view of the Board nothing to the purpose to enter on the question as to how the grievance is caused—whether by a slip of the pen, an arithmetical error or a deflection from correctness in the principle of valuation.

The Board in this case has not to determine whether some further remedy might not be available in a case of fraud, for fraud is not now maintained and has been eliminated as a ground of action. But the Board would be slow to say that even in such a case the prompt and convenient appeal

J. C. 1923 SHANNON REALTIES v. ST. MICHEL (VILLE DE).

given to persons aggrieved was excluded because their grievance was alleged to be gross and to have arisen through fraud. The present, however, is an admirable instance of how the statute works. Suppose the valuation rolls objected to were as wholly unsound as was argued for. That incorrectness was corrected, and the remedy given, and the grievance removed, simply by statutory appeal to the Circuit Court in the year 1917. In their Lordships' opinion the same course should have been taken at the making up of each of those rolls now objected to. There is a passage in the judgment of Duff J. as follows: "Even if it were shown that an assessor had over-valued property in consequence of corrupt influence, I cannot doubt that it would still be open to the municipality to correct the valuation by resorting to the statutory appeal." To which their Lordships would add that the same course would also appear to be open to the Circuit Court should it appear that the valuation had been corruptly arrived at.

Whether in the case of fraud there would be a remedy apart from the procedure under the Towns and Cities Acts does not arise for decision. It might conceivably be the case that fraud would only be brought to light in the course of the inquiry before, say, the Circuit Court; and such a case might be covered by the superintending and reforming power, order and control of the Supreme Court under art. 50 of the Code of Civil Procedure.

But in the present case no such question arises. What has happened is that the aggrieved person has simply jumped over the regulative Act to the superintending power, and instead of both Acts being read together, the latter has been appealed to, so as to make it truly a supersession of the former. This has been done under the view presented that the challenge made is more than the presentation of a grievance but a demand for a declaration of nullity. To yield to such a demand might, as already stated, in their Lordships' opinion, lead to serious confusion and possibly irretrievable mischance.

It follows that the appeal made to art. 50 of the Civil

Procedure Code Act fails, not because a remedy has been refused but because the remedy expressly given and prohibitively fenced has been ignored.

In what has been said reference has been specially made to the valuation roll sought to be declared void. The plaint, however, makes a similar declaration with regard to the rolls "de perception," that is, the collection rolls. The latter, however, are founded on and derived from the valuation roll, and in so far as this is so the latter must also stand.

But there is a special particular of attack of these. It is founded on art. 5731 of the Act 5 Geo. 5, c. 109, passed to amend the St. Michel Charter, and already quoted. That article provides that (inter alia) farmed land shall be taxed at one-fourth "of its value as entered on the valuation roll" with a maximum taxation of $150 per acre.

It follows that the valuation roll now declared valid must be the basis for the proportion struck. It is an admitted fact in the case that the appellants' lands were farmed land. If this proportion has not been struck, then the demand for taxes upon any larger scale is in contravention of statute. The Board finds itself in agreement with the judgment of Duff J. as to this point also. That learned judge says: "There remains the argument based upon the Municipal Charter, s. 28. This section deals with the subject of taxation rather than the subject of valuation. It can afford no basis for impeaching the assessment roll. Nor do I think it is a good ground for impeaching the collector's roll except as an answer to a claim for taxes. The contention now raised will be open to the respondents in answer to such a claim." This appears to the Board to be correct.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1923
July 27.

UNITED STATES OF AMERICA AND ANOTHER . . . . . } APPELLANTS;

AND

MOTOR TRUCKS, LIMITED . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Specific Performance—Common Mistake—Rectification—Jurisdiction to order Rectification and Specific Performance—Statute of Frauds—Judicature Act (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7—*Judicature Act* (*R. S. Ont.*, 1914, *c.* 56), *s.* 16 (*h*).

Where owing to a mistake common to both parties to a contract in writing it does not express the true bargain between the parties, the Court in England has jurisdiction, since the Judicature Act, 1873, to rectify the contract and to order specific performance of it as rectified, although apart from the rectified contract there is no memorandum to satisfy the Statute of Frauds.

The same is the case in the Province of Ontario under the Judicature Act (R. S. Ont., 1914, c. 56).

Craddock Brothers v. *Hunt* [1922] 2 Ch. 809; affirmed [1923] 2 Ch. 136 approved.

Judgment of the Appellate Division reversed.

APPEAL (No. 18 of 1923) from a judgment of the Appellate Division of the Supreme Court of Ontario (April 28, 1922) reversing a judgment of a judge of that Court.

By a contract dated May 18, 1918, the respondent company contracted to machine high-explosive shells for the appellant Government; the contract provided for cancellation by notice in the event of an anticipated termination of the war, and for payments to be made to the respondents thereupon. The payments were to include reimbursement for the cost of buildings, plant, etc., which the respondents had to add to their facilities for the purpose of carrying out the contract. Notice to terminate the contract was given in November, 1918, and the parties thereupon negotiated as

* *Present:* EARL OF BIRKENHEAD, VISCOUNT HALDANE, LORD SUMNER, SIR HENRY DUKE, and MR. JUSTICE DUFF.

to the sum to be paid to the respondents. Ultimately a sum of $1,653,115 was agreed, which included $376,496, being the full amount which the respondents claimed in respect of land and buildings. After deducting from the above total a large sum which had been advanced by the appellant Government to the respondents, together with interest thereon, it was agreed that $637,812 was due to the respondents.

The parties accordingly entered into a formal contract dated October 7, 1919, but not actually signed until November 8. The contract provided that it should supersede the original contract of May 18, 1918, which was thereby terminated, and that the appellant Government should pay to the respondents the sum of $637,812 in full settlement for work and goods delivered and expenses incurred under the original contract; it further provided as follows: "(4.) Title to all property specified in schedule A, hereto annexed and made a part hereof, shall vest in the United States immediately upon execution of this agreement."

The land and buildings were not included in the schedule.

The agreed sum was paid on November 10, 1919, but the respondents subsequently denied the right of the appellant Government to possession of the land and buildings.

The appellant Government brought an action against the respondents in the Supreme Court of Ontario, claiming rectification of the schedule by the inclusion of the land and buildings, and specific performance of the contract as so rectified; alternatively they claimed repayment of the sum paid in respect of the land and buildings.

The trial judge (Kelly J.) found that the intention was that the land and buildings should become the property of the appellant Government. He ordered and declared that the respondents were trustees of the land and buildings for such person as the appellant Government might direct, with rectification of the schedule, the respondents to convey the land accordingly.

On appeal to the Appellate Division the judgment of

J. C. 1923 UNITED STATES v. MOTOR TRUCKS, LD.

Kelly J. was reversed and the action dismissed, Meredith C.J. dissenting. The judgments of the majority of the Court were based mainly upon conclusions of fact.

1923. June 29, 30; July 2, 3, 5. *D. L. McCarthy K.C.*, *Sir Harold Smith K.C.* and *J. M. Beck* (Solicitor-General for the United States) for the appellant Government contended that the judgment of the trial judge was right upon the facts and in law. Upon the question of the jurisdiction of the Court to grant the double relief reference was made to the Judicature Act (R. S. Ont., 1914, c. 56), s. 16 (*h*), the Judicature Act (36 & 37 Vict. c. 66), s. 24, sub-s. 7, and to *May* v. *Platt* (1) and *Craddock Brothers* v. *Hunt*. (2)

Tilley K.C. for the respondents contended that the facts did not show that the parties intended that the land and buildings should be included in the schedule, and that if the respondents so intended it was upon a mistaken view of their rights under the contract of May 18, 1918; with regard to the relief, he argued that specific performance could not be granted, as there was no memorandum to satisfy the Statute of Frauds.

J. M. Beck replied at length upon the facts. He submitted that the contract as rectified supplied a memorandum, and that there had been a sufficient performance of the agreement as to the land and buildings to render a memorandum unnecessary.

July 27. The judgment of their Lordships was delivered by

EARL OF BIRKENHEAD. [The judgment set out the material article (No. 8) of the contract of May 18, 1918, and stated fully the facts, including references to letters and interviews between the parties, leading up to the contract dated October 7, 1919, which was set out in full; the judgment then proceeded as follows:]

The question which requires the decision of the Board is whether or not it was the intention of the parties that the

(1) [1900] 1 Ch. 616.
(2) [1922] 2 Ch. 809; affirmed [1923] 2 Ch. 136.

land and buildings, which had been paid for as claimed without deduction, should be inserted in schedule A and whether, if so, they were omitted therefrom by mutual mistake, so that rectification of an incomplete schedule should be ordered, or whether on the true interpretation of the intentions of the parties the respondents were entitled to receive all that they had expended upon acquiring the land and erecting the building, and, being so compensated, to retain both as their own.

The answer to these questions can only be found by reference to some legal considerations which their Lordships will hereinafter examine. If the parties intended that the lands and buildings should be included in schedule A, so that the omission in the instrument was accidental, rectification ought undoubtedly to be decreed. The Board, therefore, finds it necessary to examine the actions and the words of the parties at the relevant periods. And in enforcing the conclusions which will hereafter be stated their Lordships think it right to make it plain that they have entirely ignored the memorandum of the minutes of the meeting on October 7, 1919. In the opinion of the Board the terms of this memorandum were not admissible and should not have been admitted as evidence.

Their Lordships have reached the conclusion that both the appellants and the respondents intended that the land and buildings should be included in schedule A. That the appellants so intended has not been seriously disputed; and upon this point the Board entertains no doubt. Their Lordships, after giving careful attention to the matter, are no less confident that the respondents clearly understood that the award contemplated the transfer as owners to the United States of the land and buildings for which under its terms that Government had paid the respondents complete and generous compensation.

The reasons which have led their Lordships to a conclusion so clear may be shortly summarized.

[After stating the reasons for the above conclusion, the judgment proceeded:] It remains, therefore, to consider

J. C. 1923 UNITED STATES v. MOTOR TRUCKS, LD.

what view in fact and in law must be taken of the respondents' remaining contention that their agreement to part with the ownership of the lands and buildings (in which is implicit their agreement to insert them in the schedule) was produced by an error as to their legal rights under the original contract. Whether they possessed any such rights as those supposed under that contract it is not necessary to consider, for the trial judge found as a fact that those who represented the company were not at any single relevant moment forgetful of any right whatsoever which they may have possessed under that agreement. And their Lordships, so far from quarrelling with this finding, most expressly accept and approve it. Nothing need be added in parting with this contention, except that in all the circumstances it required considerable hardihood to conceive and put it forward.

But even if the company's officials had made a mistake—in the circumstances wholly incredible—such a mistake could not in law have produced any effect upon the rights of the parties. For it is not contended, and could not be, that the mistake was shared by the appellants; and unilateral error, which in such a case as the present would hardly be distinguishable from carelessness, does not afford to the respondents any ground of defence in proceedings such as these.

It was further suggested that the present action involved an attempt to enforce a parol contract inconsistently with the principle of the Statute of Frauds. It is, however, well settled by a series of familiar authorities that the Statute of Frauds is not allowed by any Court administering the doctrines of equity to become an instrument for enabling sharp practice to be committed. And indeed the power of the Court to rectify mutual mistake implies that this power may be exercised notwithstanding that the true agreement of the parties has not been expressed in writing. Nor does the rule make any inroad upon another principle, that the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified; and secondly, that such agreement has been

inaccurately represented in the instrument. When this is proved either party may claim, in spite of the Statute of Frauds, that the instrument on which the other insists does not represent the real agreement. The statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on; but when the written instrument is rectified there is a writing which satisfies the statute, the jurisdiction of the Court to rectify being outside the prohibition of the statute.

The respondents, however, advance still a further point of law. They contend that a plaintiff was not allowed to sue in the old Court of Chancery for the specific performance of a contract with a parol variation. There seems no reason on principle why a Court of equity should not at one and the same time reform and enforce a contract; the matter, however, has been much discussed in the Courts, and the balance of distinguished authority not unequally maintained. But the difficulty, which was almost entirely technical, has been, in the view of the Board, removed by the provisions of the Judicature Act, 1873, s. 24, which are reproduced in s. 16 (*h*) of the Judicature Act of the Province of Ontario, ch. 56 of the Revised Statutes of 1914. This section provides that the Court, which is to administer equity as well as law, is to grant, either absolutely or on such reasonable terms and conditions as it shall deem best, all such remedies as any of the parties may appear to be entitled to in respect of any and every legal and equitable claim properly brought forward by them in such cause or matter, so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings discouraged.

The analogous provisions of the English Judicature Act are stated by Sir Edward Fry in his book on Specific Performance, 5th ed., para. 816. The learned author holds (and the Board agrees with him) that the controversy between the Chancery judges has now become obsolete, inasmuch as since the Judicature Act the Court can entertain an action in which combined relief will be given simultaneously for the

J. C. 1923 UNITED STATES v. MOTOR TRUCKS, LD.

reformation of a contract, and for the specific performance of the reformed contract.

Despite some differences in subsequent decisions, in which the principles of s. 24 of the Judicature Act have not been sufficiently considered, it has been held by P. O. Lawrence J. and by the Court of Appeal in the very recent case of *Craddock Brothers* v. *Hunt* (1), that the principle as laid down by Sir Edward Fry must now prevail.

Their Lordships are of the same opinion, and conclude that under this head no difficulty confronts the appellants in the present case.

The Board has thought it proper to consider the matters raised in this appeal with some particularity, partly because of the importance of the case, and partly out of respect for the learned judges who took a different view in the Appellate Division. But on analysis the issue has proved to be extremely simple. Both parties intended the lands and buildings to be included in the schedule. These were inadvertently omitted. Rectification must follow unless some exceptional ground for excluding this remedy is advanced. The respondents have attempted only to show that they agreed to the schedule in its intended form by reason of an error as to their existing legal rights. This contention has been rightly negatived on the facts, and would, in any event, be irrelevant in law.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, the judgment of the Appellate Division of the Supreme Court set aside with costs, and the judgment of Kelly J. restored. The respondents will pay the costs of the appeal.

Solicitors for appellants : *Charles Russell & Co.*
Solicitors for respondents : *Blake & Redden.*

(1) [1922] 2 Ch. 809 ; affirmed [1923] 2 Ch. 136.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL OF BRITISH COLUMBIA . . . . . } APPELLANT;

AND

ATTORNEY-GENERAL OF CANADA . . RESPONDENT.

J. C.* 1923 Oct. 18.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power of Province—Employment of Japanese—Conflict with Dominion Statute—Japanese Treaty Act, 1913 (3 & 4 *Geo.* 5, *c.* 27, *Dom.*)—11 *Geo.* 5, *c.* 49, *B. C.—British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 132.

The statutes of British Columbia for 1921 (11 Geo. 5) by c. 49 purported to validate certain Orders in Council of the Province which provided that in all contracts, leases and concessions made by the Government provision should be made that no Chinese or Japanese should be employed in connection therewith. A treaty made between Great Britain and Japan in 1911 provided that the subjects of each should have full liberty to reside in the territories of the other, and in relation to their industries should be on the same footing as the subjects or citizens of the most favoured nation. By the Japanese Treaty Act, 1913, the Dominion Legislature had declared the treaty to have the force of law in Canada:—

Held, that the statute of British Columbia was invalid, as it violated the principle laid down in the Japanese Treaty Act, 1913, the enactment of which by the Parliament of Canada was authorized by s. 132 of the British North America Act, 1867.

Judgment of the Supreme Court affirmed.

APPEAL (No. 41 of 1922) from a judgment (February 7, 1922) of the Supreme Court of Canada. (1)

The judgment appealed from was upon the two following questions submitted to the Supreme Court on November 12, 1921, by the Governor-General in Council: (1.) Had the Legislature of British Columbia authority to enact ch. 49 of the Statutes of 1921, entitled "An Act to validate and confirm certain Orders in Council and provisions relating to the employment of persons on Crown property"? (2.) If

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD ATKINSON, LORD SHAW, and LORD SUMNER.

(1) 63 Can. S. C. R. 293.

J. C. 1923

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

the said Act be in the opinion of the Court ultra vires in part only, then in what particulars is it ultra vires ?

The Supreme Court (Davies C.J., Duff, Anglin and Mignault JJ. ; Idington J. dissenting, and Brodeur J. dissenting in part) answered the questions as follows : " The answer of the Court to the first question submitted by His Excellency the Governor-General is in the negative. It is therefore unnecessary to answer the second question. Idington J. dissenting ; Brodeur J. dissenting in part."

The circumstances in which the questions were submitted, and the effect of the opinions expressed by the learned judges, appear from the judgment of the Judicial Committee. The reference to the Supreme Court is reported at 63 Can. S. C. R. 293.

1923. July 12, 13. *Sir John Simon K.C.*, *Farris* (Attorney-General of British Columbia) and *Hon. Geoffrey Lawrence* for the appellant. In *Brooks-Bidlake and Whittall* v. *Attorney-General for British Columbia* (1) the Board held that the stipulation confirmed by the Provincial Orders in Council, and consequently the Provincial Act, was not ultra vires of the Province under ss. 91 and 92 of the British North America Act, 1867, since the decision of the Board in *Cunningham* v. *Tomey Homma* (2) and not that in *Union Colliery Co.* v. *Bryden* (3) was applicable. Nor did the Act conflict with the Japanese Treaty Act. It enacted disabilities upon persons of certain racial origin, not upon any persons as having certain nationality or allegiance. The Act treated equally a Japanese who was a citizen of the United States and a Japanese who was a Japanese subject. The Chinese whose exclusion from employment was held to be legitimate in the *Brooks-Bidlake Case* (1) might have been Japanese subjects. The distinction between an Act dealing with persons of a certain racial origin, and one dealing with persons of a certain nationality, was pointed out by Duff J. in *Quong Wing* v. *The King.* (4) It is within the executive and

(1) [1923] A. C 450.
(2) [1903] A. C. 151.
(3) [1899] A. C. 580.
(4) (1914) 49 Can. S. C. R. 440, 463.

legislative power of a Province to prescribe by what persons its timber shall be felled.

Newcombe K.C. and *T. Mathew* for the respondent were not called upon.

Oct. 18. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada, expressing the answers to two questions submitted to that Court by the Governor-General of Canada in Council, under the Canadian Supreme Court Act. The first of the questions was whether the Legislature of British Columbia had power to enact ch. 49 of its Statutes for 1921, being an Act to validate and confirm certain Orders in Council and provisions relating to the employment of persons on Crown property. The second question was, if the Court thought the Act ultra vires in part only, in what particulars was it ultra vires.

The majority of the learned judges in the Supreme Court replied that the Legislature of the Province had no power to enact the statute in question, and that the second question consequently did not arise.

The relevant facts are briefly these: In 1902 two minutes were passed in the Executive Council of the Province and approved by the Lieutenant-Governor. The Executive Council set out in these minutes resolutions passed by the Legislative Assembly, and recommended, in accordance with these resolutions, that all tunnel and drain licences issued under s. 58 of the Mineral Act and s. 48 of the Placer Mining Act, and all leases granted under Part VII. of the latter Act, should contain provisos that they were granted on the express condition that no Chinese or Japanese should be employed in or about the tunnels, drains or premises to which the licences or leases related, and that a similar provision should also be inserted in all instruments relating to a number of enumerated leases and licences which should be issued by the officers of the Provincial Government.

In 1913 a treaty was made between His Majesty the King and the Emperor of Japan by which it was, among other

J. C. 1923

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

things, agreed that the subjects of each of the High Contracting Parties should have full liberty to enter, travel and reside in the territories of the other, and in all that relates to the pursuit of their industries, callings, professions and educational studies, should be placed in all respects on the same footing as the subjects or citizens of the most favoured nation.

Sect. 132 of the British North America Act provides that the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries. On April 10, 1913, the Parliament of the Dominion passed the Japanese Treaty Act of that year. The Act provided that the Treaty just referred to should be thereby sanctioned and declared to have the force of law in Canada.

On April 2, 1921, the Legislature of British Columbia proceeded to pass the Oriental Orders in Council Validation Act. This statute purported to validate and confirm the two Orders in Council of the Province already referred to, and passed in the form of recommendations of the Provincial Executive Council approved by the Lieutenant-Governor in May, 1902. The statute further provided that the Orders should be deemed to have been valid and effectual according to their tenor as from the dates of the approval, and that where in any instrument referred to in the said Orders in Council, or in any instrument of a similar nature to any of those so referred to, issued by any minister or officer of any department of the Government of the Province, any provision had heretofore been inserted or was thereafter inserted relating to or restricting the employment of Chinese or Japanese, that provision should be deemed to have been and to be valid, and always to have had the force of law according to its tenor. It was further enacted that every violation of or failure to observe any such provision on the part of any licensee, or other person in whose favour the instrument operated, should be sufficient ground for the cancellation of the instrument by the Lieutenant-Governor.

This is the statute the validity of which has been the subject of decision by the Supreme Court of Canada. Before, however, proceeding to the questions there discussed reference must be made to certain recent proceedings which resulted in an appeal to the Sovereign in Council and a decision which restricts the questions that are still open.

In 1912 licences had been granted by the Minister of Lands of British Columbia to certain persons, enabling them to cut and carry away timber on lands belonging to the Province. Each of these licences was granted for a year only, but under a provision in the Crown Lands Act the licences were renewable from year to year if these terms and conditions had been complied with. Among these was the stipulation, inserted in accordance with the Orders in Council of 1902, that no Chinese or Japanese were to be employed in connection with the licence. The stipulation had been violated by the grantees, but notwithstanding this the licences had been renewed down to 1920.

In that year the Lieutenant-Governor of the Province referred to the Court of Appeal for British Columbia the question whether the stipulation was valid, having regard to head 25 of s. 91 of the British North America Act, which reserves for the Dominion Parliament the exclusive power to legislate with reference to "naturalization and aliens," and also to possible repugnancy to the Dominion Japanese Treaty Act of 1913. The Court of Appeal of British Columbia held the stipulation to be invalid on both grounds. However, the licences were in fact renewed for another year, and meantime the Oriental Orders in Council Validation Act was passed in April, 1921. Apparently relying on the new statute the Minister of Lands called the attention of the grantees to their breach of the stipulation, and threatened to cancel the licences.

The grantees or the persons who had succeeded them in title then commenced an action in the Supreme Court of British Columbia claiming a declaration that, notwithstanding the stipulation, they were entitled to employ Chinese and Japanese on the timber lands, and an injunction against

J. C.
1923
ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

interference with their enjoyment under the licences. On an interlocutory motion, the judge of first instance, holding himself bound by the opinion previously given by the Court of Appeal, granted an injunction. The Provincial Government, by arrangement, appealed directly to the Supreme Court of Canada. While this appeal was pending the Governor-General referred to the Supreme Court the questions in the appeal now before their Lordships, as to the validity of the Provincial statute. The Supreme Court heard the two matters before it together, and gave successive judgments in them. As already stated, the majority held the Provincial statute to be invalid. But on the appeal in the action (1) they allowed the appeal and dismissed the action itself, mainly on the ground that, even though the stipulation as to not employing Oriental labour were void, it not the less formed one of the conditions of the licences, and could not be treated as struck out of them, with the result that the only right to renewal was one which, being founded on a condition which was its foundation notwithstanding any illegality, must fail.

This last question was brought on appeal to the Privy Council. Their Lordships considered both of the points made. They held, first, that the stipulation was not void as violating s. 91 of the British North America Act. For it related only to the way in which the Province claimed to be free to manage its own property as distinguished from a claim to regulate the general status of aliens. Whatever might be said about the stipulation as affecting this in the case of Japanese labour, there was nothing in the Treaty Act which affected the status of Chinese labour, and it was therefore only under s. 91 that the stipulation as to Chinese labour, which was severable, could be struck at. As their Lordships were of opinion that this particular stipulation was not inconsistent with s. 91, the appellants had no right to renewal. The point as to the Treaty Act thus became immaterial, and their Lordships did not deal with it, but dismissed the appeal on the ground just stated.

That decision (*Brooks-Bidlake and Whittall*, v. *Attorney-*

(1) 63 Can. S. C. R. 466.

General for British Columbia (1)) thus leaves the question now before their Lordships for decision untouched. The views taken of it by the learned judges in the Supreme Court of Canada were divergent. Davies C.J. thought that the Provincial Act of 1921 was ultra vires (1.) as infringing the provisions of s. 91 of the British North America Act, and (2.) as conflicting with the provisions of the Treaty Act, 1913, by prohibiting the employment of Japanese subjects. Idington J. (who dissented from the conclusion of the majority) was of opinion that the powers of the Provincial Government over the lands of the Province were as extensive as those of private owners, and that a private owner could have determined not to have Japanese subjects on his property, and could have stipulated to that effect. He thought that, this being so, the terms of the Treaty must be construed as leaving intact the right of the Province to exercise that liberty of a private owner, which he held the Treaty not to touch. Duff J. devoted the first part of an exhaustive judgment to the question whether the Provincial statute of 1921 was ultra vires as being an attempt at legislation in regard to aliens, the capacity for which was conferred exclusively on the Dominion Parliament by s. 91. He came to the conclusion that the statute was not such an attempt, but was so far a legally valid exercise by the Provincial Legislature of a power confided to it of making provision for settlement on Provincial property of a suitable population. He pointed out that the two Orders in Council and the condition which they imposed related only to specific and limited kinds of such property. What was excluded was not the employment of subjects of foreign Powers, in particular, but that of Chinese and Japanese, whether aliens, naturalized subjects or native-born subjects, under particular circumstances. But when the learned judge passed to s. 132 he came to the conclusion that the Treaty Act was the exercise of an authority to the Dominion to deal with subjects of imperial and national concern as distinguished from matters of strictly Dominion concern only. He thought the scope of the section broad

(1) [1923] A. C. 450.

J. C. 1923 ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

enough to support the Treaty Act, and to put Japanese subjects in the same position before the law as the subjects of the most favoured nation. The statute of 1921 he held to contravene the right so given to Japanese subjects, by excluding them from employment in certain definite cases. And this was not the less so in that the Province in so doing was administering its own corporate and economic affairs. The new Provincial law was repugnant to the Treaty and could not stand. Since the statute of 1921 treats Chinese and Japanese as constituting a single group, the learned judge thought that it was inoperative, not merely as regards Japanese subjects, but in toto. Anglin J. based his opinion entirely on s. 91, which he held the statute of 1921 to contravene. It was in substance a statute passed to deprive Chinese and Japanese of general capacity. He expressed no opinion about the effect of the Treaty Act. Mignault J. delivered judgment to the same effect as Anglin J. Brodeur J. thought the Provincial statute intra vires so far as s. 91 was concerned, and authorized by s. 92, head 5, which confers on the Province authority to manage the public lands belonging to it. But he considered the statute to be ultra vires in so far as Japanese subjects were concerned, as conflicting with the provisions of the Treaty Act. He considered it, however, to be intra vires as regards the Chinese.

As the result of the opinion delivered in the Supreme Court of Canada, the Governor-General in Council on March 31, 1922, being within the year from the passing of the statute of 1921 during which his power of disallowance remained operative, disallowed it.

Leave to appeal to the Sovereign in Council against the judgment of the Supreme Court was subsequently given. On the decision in the present appeal depends, therefore, the ascertainment of the limits within which the Legislature of the Province can attempt further legislation on the subject. What their Lordships have to consider is whether the statute of 1921 is invalid on any of the grounds alleged. The main reasons submitted in favour of its invalidity are, first that s. 91, head 25, of the British North America Act has debarred

the Provincial Legislature from enacting what was really in its pith and substance legislation dealing with the rights of aliens. It is said that although the statute contains provisions regulating the mode of dealing with its own property by the Province, it not the less is a statute which affects radically the status of classes of aliens. Whether it relates to Chinese or Japanese it thus equally trenches to an extent which cannot be exhaustively defined on the subject matter assigned to the Dominion by s. 91, head 25. The principle which applies is alleged to be that laid down in *Union Colliery Co.* v. *Bryden* (1), and not that applied in *Cunningham* v. *Tomey Homma.* (2)

In the appeal in the *Brooks-Bidlake Case* (3) what their Lordships decided was that the stipulation in the licences against the employment of Chinese was a severable stipulation which had been broken, with the result that the licensees could not claim a renewal. Such a stipulation was held to be in itself consistent with s. 91, head 25, and so far as Chinese labour was concerned no question could arise under the Japanese Treaty.

On the present occasion a wholly different question presents itself. The statute of 1921 not only confirms the stipulations provided for in the Orders in Council of 1902, but it enacts that where in any instrument of a similar nature to any of those referred to in these Orders a provision is inserted relating to or restricting the employment of Chinese or Japanese, the provision is to be valid and to have the force of law, and failure to observe it is to be ground for cancellation by the Provincial Government of the licence or other instrument. Their Lordships observe that this provision may not altogether unreasonably be looked on as containing an approach to the laying down of something more than a mere condition for the renewal of the right to use Provincial property. Still, the question is far from free from difficulty, for the reasons assigned by Duff J. in his judgment in the Supreme Court.

(1) [1899] A. C. 580. (2) [1903] A. C. 151.
(3) [1923] A. C. 450.

J. C.
1923
ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

In the view, however, which their Lordships take of the bearing of the Treaty Act on the statute it becomes unnecessary for them to express any opinion about it, and they refrain from doing so in accordance with the practice which they have repeatedly laid down for their own guidance of deciding no more than is necessary in appeals relative to the interpretation of the British North America Act.

As regards the question arising as to the application of the Treaty Act itself, they entertain no doubt that the Provincial statute violated the principle laid down in the Dominion Act of 1913. This conclusion does not in any way affect what they decided on the previous appeal as to the title to a renewal of the special licences relative to particular properties. It is concerned with the principle of the statute of 1921, and not with that of merely individual instances in which particular kinds of property are being administered.

The statute has been disallowed, and if re-enacted in any form will have, in their Lordships' opinion, to be re-enacted in terms which do not strike at the principle in the Treaty that the subjects of the Emperor of Japan are to be in all that relates to their industries and callings in all respects on the same footing as the subjects or citizens of the most favoured nation. They are unable to accept the view that as the terms of the statute stand they do not infringe this principle so far as concerns subjects of the Emperor. That others who are not such subjects happen to be included can make no difference to this conclusion.

As the result, their Lordships will humbly advise His Majesty that the first of the questions submitted to the Supreme Court of Canada should be answered in the negative, as that Court has answered it. The second question does not arise for the reason they have indicated. The statute has been disallowed. It may not be necessary to enact it in a fresh form, but if this is to be done it may be possible so to redraft it as to exclude from the operation of its principle all subjects of the Japanese Emperor and also to avoid the risk of conflict with s. 91, sub-s. 25, of the British North

America Act. The question whether there has been success in the latter respect can only be answered when the terms of any fresh statute are known. The appeal should accordingly be dismissed, and, in accordance with a practice that is usual, without costs.

J. C. 1923 ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

Solicitors for appellant: *Gard, Lyell, Betenson & Davidson.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

THE KING . . . . . APPELLANT;

AND

ATTORNEY-GENERAL OF BRITISH COLUMBIA . . . . . } RESPONDENT.

J. C.* 1923 *Oct.* 18.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Bona vacantia—"Royalties"—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *ss.* 102, 109.

Bona vacantia are "royalties" within s. 109 of the British North America Act, 1867, and accordingly belong to the Province in which they are situate or arise, and not to the Dominion. The word "royalties" is used in the section as the equivalent of jura regalia. Its meaning is not limited by its association with the words "lands, mines, minerals."

Attorney-General of Ontario v. *Mercer* (1883) 8 App. Cas. 767 and *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1888) 14 App. Cas. 295 applied.

Judgment of the Supreme Court of Canada affirmed.

APPEAL (No. 72 of 1922) by special leave from a judgment (May 31, 1922) of the Supreme Court of Canada (1) reversing a judgment (January 22, 1918) of the Exchequer Court.

The question in the appeal was whether a sum of $7215,

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD ATKINSON, LORD SHAW and LORD SUMNER.

(1) 63 Can. S. C. R. 622.

J. C. 1923 REX v. ATTORNEY-GENERAL OF BRITISH COLUMBIA.

which moneys the parties agreed were bona vacantia, belonged to the Province of British Columbia, in which the fund arose, or to the Dominion of Canada. The circumstances in which the fund arose appear from the judgment of the Judicial Committee.

By the British North America Act, 1867, s. 109, "all lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, ... shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." By Order in Council of May 16, 1871, pursuant to s. 146 of the Act of 1867, British Columbia was admitted as a Province to the Union, the provisions of that Act being made applicable to it as if it had been one of the Provinces originally united by the Act. Unless bona vacantia came within s. 109 they were appropriated to the public service of Canada under the general provision in s. 102 of the Act.

The Supreme Court of Canada (Idington, Duff, Anglin and Brodeur JJ.; Davies C.J. dissenting) held, reversing the Court of Exchequer, that bona vacantia were "royalties" within the meaning of s. 109, and that the fund in question accordingly belonged to the Crown in the right of the Province and not in the right of the Dominion. The appeal is reported at 63 Can. S. C. R. 622.

1923. July 10. *Newcombe K.C.* and *Stuart Moore* for the appellant.

Sir John Simon K.C., *Farris K.C.* (*Attorney-General of British Columbia*) and *Hon. Geoffrey Lawrence* for the respondent.

The arguments for the appellant appear from the judgment. Counsel for the respondent were stopped.

[Reference was made to *Attorney-General of Ontario* v. *Mercer* (1); *St. Catherine's Milling and Lumber Co.* v. *The*

(1) 8 App. Cas. 767.

Queen (1); *Attorney-General of British Columbia* v. *Attorney-General of Canada* (*Precious Metals Case*) (2); and *Maritime Bank of Canada* v. *Receiver-General of New Brunswick*. (3)]

Oct. 18. The judgment of their Lordships was delivered by

LORD SUMNER. The issue in this appeal is whether, under the British North America Act, 1867, ss. 102 and 109, bona vacantia, found in the Province of British Columbia, belong to the Crown in right of the Province or in right of the Dominion. The facts are as follows:—

An English company, incorporated in 1871 under the English limited liability Acts to trade in British Columbia, was obliged to go into liquidation, and in 1879 the company and its then liquidator authorized a gentleman in British Columbia, named Rithet, to get in its property and assets in the Province, which he proceeded from time to time to do.

The company was finally dissolved in 1907 and the liquidator died. In 1911 Mr. Rithet, having then in his hands a balance of $7215 on account of the company in liquidation and finding that there remained no person and no company to whom he could pay this sum, placed the facts before the Governments both of the Dominion and of the Province, and having thus done his duty passes out of the story, leaving the disposition of this sum to the law. These facts are admitted, as is also the conclusion that the sum of $7215 is bona vacantia falling to the Crown in one right or the other. On this footing their Lordships are finally to determine the question, which in Canada was decided in the Supreme Court of Canada by reversing the judgment of the Exchequer Court of Canada given in favour of the Dominion. All that need be noted about the actual subject matter of the dispute is that, as the parties have admitted it to be in itself bona vacantia, their Lordships have proceeded on the footing of this admission inter partes to consider the right to it.

(1) (1888) 14 App. Cas. 46. (2) (1889) 14 App. Cas. 295.
(3) [1892] A. C. 437.

J. C. 1923 REX v. ATTORNEY-GENERAL OF BRITISH COLUMBIA.

The appeal really depends on the true construction of the words " all lands, mines, minerals and royalties belonging to the several Provinces of . . . . " in s. 109 of the British North America Act, words which have already repeatedly come before their Lordships' Board for decision. In these cases their Lordships' predecessors were careful to confine the actual determination to the subject matter in hand, which was not in any of the cases either bona vacantia or any prerogative right of a precisely analogous character, but the reasoning on which one at least of those decisions is rested is so closely applicable to the present appeal, that the first question must now be how far, if at all, this appeal is not already covered by authority.

In *Attorney-General of Ontario* v. *Mercer* (1), lands in Ontario, which had escheated to the Crown after 1867, were the subject matter of a contest of rights similar to that which now arises, and on the construction of s. 109 the Judicial Committee decided that the Province was entitled to the lands as against the Dominion. In so doing they expressly negatived the contentions now raised for the Dominion in two respects. It has been argued, firstly, that royalties in this section ought to be confined to mining royalties owing to the collocation of the words " mines, minerals and royalties," and, secondly, that if it has a more extended sense it must not be taken as extending to all jura regalia in general and in particular not to bona vacantia. On the first point Lord Selborne observes in delivering the opinion of the Board (2) : " It appears to their Lordships to be a fallacy to assume that because the word ' royalties ' in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated,—lands as well as mines and minerals, even as to mines and minerals it here necessarily signifies rights belonging to the Crown jure coronae. . . . . Every word ought, prima facie, to be construed in its

(1) 8 App. Cas. 767. (2) Ibid. 778.

primary and natural sense, unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense 'royalties' is merely the English translation or equivalent of 'regalitates,' 'jura regalia,' 'jura regia.' . . . . " Accordingly the conclusion of the Board was that the word " royalties " and not the word " lands " covered the right of escheat of lands. Lord Selborne proceeded in the same passage as follows : " The subject was discussed with much fullness of learning in *Dyke* v. *Walford* (1), where a Crown grant of jura regalia belonging to the County Palatine of Lancaster was held to pass the right to bona vacantia. 'That it is a jus (said Mr. Ellis in his able argument) is indisputable ; it must also be regale ; for the Crown holds it generally through England by royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the Sovereign. It stands on the same footing as the right to escheats, to the land between high- and low-water mark, to felons' goods, to treasure-trove and other analogous rights.' With this statement of the law their Lordships agree, and they consider it to have been in substance affirmed by the judgment of Her Majesty in Council in that case."

On examining the opinion delivered in *Dyke* v. *Walford* (1) by Mr. Pemberton Leigh, their Lordships think that Lord Selborne's expression above quoted, " in substance affirmed," is exact if it be not an understatement. The words under construction were " quaecumque alia libertates et jura regalia ad Comitem Palatinum pertinentia," and of them the opinion observes (2) : " We cannot doubt that the right in question passed to the Duke of Lancaster amongst other 'jura regalia,' unless there be something in the grant restricting its effect "—a possibility which Mr. Pemberton Leigh then proceeded to examine and dismiss.

Lord Selborne, however, finally left the door, if not exactly open, still slightly ajar to the present appellant's argument by cautiously concluding thus : " Their Lordships are not now called upon to decide whether the word 'royalties' in s. 109

(1) (1846) 5 Moo. P. C. 434. (2) Ibid. 498.

J. C. 1923 REX v. ATTORNEY-GENERAL OF BRITISH COLUMBIA.

of the British North America Act of 1867 extends to other Royal rights besides those connected with 'lands,' 'mines' and 'minerals.' The question is whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats in respect of lands."

In subsequent cases, in which it has been necessary to consider the construction of s. 109, their Lordships' Board has adopted the exposition above quoted from *Attorney-General of Ontario* v. *Mercer* (1), and has followed its example in applying the section only so far as was necessary to dispose of the question in issue. In *Attorney-General of British Columbia* v. *Attorney-General of Canada* (2), their Lordships held that s. 109 had the effect of reserving to the Province of British Columbia any deposits of the precious metals, not as being "mines and minerals," but as "royalties" connected with them, and this decision has a bearing on the present appeal. To the actual nuggets in the quartz and the particles of fine gold in the auriferous sand the word "royalties" gives the Province a title because of the Crown's prerogative right to mines of precious metals. If a prospector under licence picked out the nuggets with a jack knife or washed the gold out with a pannikin and then was found dead and unknown in the wilderness with the gold on his person, is there any presentable reason in the substance of the thing why the same gold, though severed and reduced legitimately into possession, should not equally fall to the Province or rather to the Crown in right of the Province, under the royalty, which entitles the Crown to bona vacantia? Again, if the same prospector had fashioned the gold into a ring, a necklace or an armlet, and, having hidden it, had disappeared, would not these ornaments have received the same destination as being treasure-trove? It is not easy to see where the line is to be drawn between precious metals, which it is now decided fall to the Crown in right of the Province as being "royalties" when in the ground, and the same metals when no longer in the ground, whether worked up or not, which in any other collocation

(1) 8 App. Cas. 767. (2) 14 App. Cas. 295, 305.

of words would be royalties, that is jura regalia, also. It should also be noted how closely analogous to bona vacantia is the case of escheats, which also pass under s. 109 as royalties. Except for the difference between a right to lands, the title to which is ultimately in the Crown, and a right to personalty, which is complete in a private person, if there be a private person entitled, the principle on which bona vacantia and escheats fall to the Crown is the same, that is that there being no private person entitled, the Crown takes.

Upon the construction of s. 109 the argument for the Dominion dwells on two points: (1.) That the collocation of "all lands, mines, minerals and royalties" involves that rule of construction, which is called the ejusdem generis rule, or, alternatively, that indicated by saying noscitur a sociis, so that the word "royalties" must by construction be limited to royalties of a territorial character; and (2.) that all these things thus named must further "belong to" the Province at the time of the Union as a condition of falling to it under the Act. It is true that a common genus may be devised, which would comprehend all four nouns substantive, just because they all possess the quality of belonging to the Crown in right of one of the Provinces at the date of the Union, but they are not brought together as genus and species by any such words as give rise to the niceties of the ejusdem generis rule, nor would their possession of this common quality advance the argument on either side in the least degree. The truth is, that they constitute a simple enumeration, that the word "all" applies equally to all four, and that it is in no case limited, except by the words "belonging" to the several Provinces, and the words might equally well have been "all royalties, lands, mines and minerals" or "all royalties, all lands, all mines and all minerals." It is true that the word "territorial" is (in other contexts) employed in the opinions of the Judicial Committee in several of the earlier cases, but not, as it seems to their Lordships, in a sense which would support the present argument. The other argument, that the word "royalties" here means royalties—jura regalia—having something to

J. C. 1923 REX v. ATTORNEY-GENERAL OF BRITISH COLUMBIA.

do with lands or minerals, and so noscitur a sociis, appears to beg the question. It was held that precious metals, though not minerals, fall to the Crown in right of the Province, not because they are like minerals, for, except in a legal sense, they are minerals already, but because they are covered by jura regalia. If the Legislature, in giving effect to a division between Dominion and Provinces of that complex of rights, which before the Union belonged to the Crown in the right of the various Provinces existing in British North America, chose to enumerate a catalogue of particular rights, which were reserved to the Provinces then included or subsequently to be included under the Dominion, out of the total of the "duties or revenues" which were to form the one consolidated revenue fund to be appropriated for the public service of Canada, it is not for any Court of construction to speculate as to the reasons for this policy so far as to attribute to that, which is expressed as a catalogue, limiting attributes which would convert it into a classification by genus and species. Their Lordships must take the words of s. 109 as they stand, and, as they stand, they enumerate certain Crown rights the benefit of which is to be enjoyed by the Provinces, then existing or under appropriate legislation thereafter brought within the ambit of that benefit, as British Columbia has been. By that enumeration their Lordships, like other Courts, are bound.

A very learned argument upon the words "belonging to" in s. 109 appears to have been addressed to the Courts in Canada, the gist of which was that, in order that British Columbia should be entitled to claim bona vacantia under s. 109, it was necessary to show on behalf of the Province that the casual revenues arising from that head of jura regalia had prior to 1867 in fact been appropriated by the Government of that Province. On this head considerable research appears to have been made into the despatches passing between the Governors of the Provinces and the Colonial Office. The point became of minor importance in the Supreme Court of Canada, and was not relied upon at

their Lordships' Bar. Accordingly, without expressing any opinion on the question whether the words "belonging to" mean "already in fact appropriated," or only "such as the Province was entitled to appropriate," their Lordships think it sufficient to observe that this question, which is substantially one of fact, has not been established in favour of the Dominion in the sense of the argument advanced on its behalf, and that the point must be taken to have failed for the purpose of the present appeal.

It was further submitted that if an extended construction be given to the word "royalties" in s. 109, the result would be that "lands, mines, minerals and royalties" would be co-extensive with "revenues and duties" in s. 102, and thus the exception would be as wide as the grant. Formally this is an objection of some weight. Their Lordships may, however, observe that as soon as it is clear that Crown lands and minerals, forests and precious metals, in the Province are to be held by the Crown in right of the Province, any beneficial interest in casual revenue derivable from jura regalia must be of relatively slight importance. They do not, however, propose to decide on this occasion that the words of the reservation in s. 109 are exhaustive of the grant in s. 102. Mindful of the words of Lord Selborne in *Attorney-General of Ontario* v. *Mercer* (1) that "the general subject of the whole section is of a high political nature," and fully conscious of the fact that, as between the Dominion and the Provinces, the partition of venerable rights, such as the jura regalia of the Crown must always be, is necessarily important far beyond their current pecuniary value, their Lordships propose to follow the guarded course of their predecessors, and to confine the expression of their opinion to bona vacantia, the case in hand. Accordingly, other jura regalia, such as flotsam and jetsam, deodands, swans and sturgeons, bona et catalla felonum and many others must await decision till the case arises, and till then no opinion can be expressed upon the argument that a content is being attributed in the present appeal to the word "royalties" in

(1) 8 App. Cas. 767.

J. C. 1923 REX v. ATTORNEY-GENERAL OF BRITISH COLUMBIA.

s. 109 which has the effect of eviscerating the words " duties and revenues " in s. 102.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Solicitors for appellant: *Gard, Lyell, Betenson & Davidson.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1923 Oct. 18.

ATTORNEY-GENERAL OF BRITISH COLUMBIA . . . . . } APPELLANT;

AND

ATTORNEY-GENERAL OF CANADA . . RESPONDENT.

ATTORNEY-GENERAL FOR ONTARIO . INTERVENER.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Customs Duties—Importation of Liquor by Provincial Government—Property of Province—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *s.* 91, *heads* 2, 3; *s.* 125.

Customs and other duties imposed by the Dominion of Canada upon alcoholic liquors imported into Canada can be levied upon alcoholic liquors imported by the Government of British Columbia for the purpose of sale by it. The power of the Dominion under the British North America Act, 1867, s. 91, heads 2 and 3, to impose duties upon the importation of goods into Canada is not limited by s. 125, which exempts the " property " of a Province from taxation.

Judgment of the Supreme Court of Canada affirmed.

APPEAL (No. 34 of 1923) by special leave from a judgment (October 10, 1922) of the Supreme Court of Canada (1), affirming a judgment (February 25, 1922) of the Court of Exchequer.

The action was brought by the appellant, who claimed that the Crown, in the right of the Province, was entitled to import goods into Canada from abroad for the purpose of sale in the Province, without liability to pay customs and other duties

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD ATKINSON, LORD SHAW, and LORD SUMNER.

(1) 64 Can. S. C. R. 377.

imposed by the Parliament of Canada in respect of the importation of goods of the kind so imported. The facts appear from the judgment of the Judicial Committee.

The British North America Act, 1867, s. 91, assigns to the Parliament of Canada exclusive legislative power in relation to: (head 2) "the regulation of trade and commerce," (head 3) "the raising of money by any mode or system of taxation." Sect. 125 provides: "No land or property belonging to Canada or any Province shall be liable to taxation."

The Court of Exchequer held that the Province was liable to pay the duties, and that judgment was affirmed by the Supreme Court (Davies C.J. and Idington, Duff, Anglin and Mignault JJ.; Brodeur J. dissenting). The proceedings on appeal to the Supreme Court are reported at 64 Can. S. C. R. 377.

1923. June 10, 12. *Farris K.C.* (Attorney-General of British Columbia) and *Hon. Geoffrey Lawrence* for the appellant, contended that the customs duties were "taxation," and relied upon s. 125. [Reference was made to *Smith* v. *Vermillion Hills Rural Council* (1), and *City of Montreal* v. *Attorney-General for Canada.* (2)]

Hon. Geoffrey Lawrence for the intervener supported the appellant.

Newcombe K.C. and *T. Mathew* for the respondent. The imposition of duties upon goods imported into Canada is not "taxation" within the meaning of s. 125, but falls within "the regulation of trade and commerce" (head 2 of s. 91); it is also authorized by head 3. The duties are not within the purview of "taxation" as that word is used in s. 125. But in any case s. 125 is not applicable, because the powers given by s. 91 are given "notwithstanding anything in this Act."

Farris K.C. replied.

Oct. 18. The judgment of their Lordships was delivered by LORD BUCKMASTER. The question raised upon this appeal

(1) [1916] 2 A. C. 569. (2) [1923] A. C. 136.

J. C. 1923

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

is whether there is power conferred upon the Dominion Parliament by the British North America Act of 1867 to impose customs duties or excise or sales tax upon goods when they enter the Dominion although they are the property of one of the Provinces. The case arises in the following way :—

The Province of British Columbia in 1921 established Government control and sale of alcoholic liquors by various statutes, enumeration of which is unnecessary. The Dominion Parliament, on the other hand, imposed customs or sales or excise duty upon, among other things, alcoholic liquors imported into the Dominion. In July of 1921 the appellant, acting as duly authorized agent under the British Columbia Liquor Act, purchased in Great Britain in the name and on behalf of His Majesty in right of the Province one case of "Johnny Walker Black Label" whisky, which was duly shipped from Glasgow and consigned to His Majesty in the right of the Province. Upon demand for delivery of this whisky the Collector of Customs, on behalf of the Dominion Government, refused delivery until payment of the customs duty and excise or sales tax. The appellant denied his right to claim these duties, and took the proceedings out of which this appeal has arisen to test his claim. The statutes under which it was claimed the right to impose such duties arose were the following : s. 3 and item A of the Customs Tariff Act, 1907 ; s. 2, sub-s. 3, of the Customs Act, 1917 ; s. 19 BBB, sub-s. 1, of the Special War Revenue Act, 1915; and s. 6, sub-s. 1, of the Special War Revenue Act, 1915.

Nothing depends upon the language of these statutes. They admittedly embrace all consignments without distinction of consignee. The question is whether there was power so to legislate.

The Exchequer Court of Canada dismissed the appellant's claim with costs, and the Supreme Court, by a majority, have supported that judgment. The real issue lies in determining the true meaning to be given to s. 125 of the British North America Act, which provides that "No lands or property belonging to Canada or any Province shall be liable

to taxation." Taken alone and read without consideration of the scheme of the statute, this section undoubtedly creates a formidable argument in support of the appellant's case. It is plain, however, that the section cannot be regarded in this isolated and disjunctive way. It is only a part of the general scheme established by the statute with its different allocations of powers and authorities to the Provincial and Dominion Governments. Sect. 91, which assigns powers to the Dominion, provides, among other things, that it shall enjoy exclusive legislative authority over all matters enumerated in the Schedule, included among which are the regulation of trade and commerce and raising of money by any mode or system of taxation. The imposition of customs duties upon goods imported into any country may have many objects; it may be designed to raise revenue or to regulate trade and commerce by protecting native industries, or it may have the two-fold purpose of attempting to secure both ends; in either case it is a power reserved to the Dominion. It has not indeed been denied that such a general power does exist, but it is said that a breach is created in the tariff wall, which the Dominion has the power to erect, by s. 125, which enables goods of the Province or the Dominion to pass through, unaffected by the duties. But s. 125 cannot, in their Lordships' opinion, be so regarded. It is to be found in a series of sections which, beginning with s. 102, distribute as between the Dominion and the Province certain distinct classes of property, and confer control upon the Province with regard to the part allocated to them. But this does not exclude the operation of Dominion laws made in exercise of the authority conferred by s. 91. The Dominion have the power to regulate trade and commerce throughout the Dominion, and, to the extent to which this power applies, there is no partiality in its operation. Sect. 125 must, therefore, be so considered as to prevent the paramount purpose thus declared from being defeated.

The case is not dissimilar from the case of *Attorney-General of New South Wales* v. *Collector of Customs, New South Wales* (**1**),

(**1**) (1906) 5 Commonwealth L. R. 818.

J. C. 1923 ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

but it is unnecessary to examine whether the reasoning upon which that judgment depends can be made applicable in the present case, because, in their Lordships' view, the true solution is to be found in the adaptation of s. 125 to the whole scheme of Government which the statute defines.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. In accordance with the usual practice in these cases there will be no order as to costs.

Solicitors for appellant: *Gard, Lyell, Betenson & Davidson.*
Solicitors for respondent: *Charles Russell & Co.*
Solicitors for intervener: *Blake & Redden.*

H. L. (Sc.)* 1923 *July* 25.

[HOUSE OF LORDS.]

CANTIARE SAN ROCCO, S.A. (SHIPBUILDING COMPANY) AND ANOTHER . . } APPELLANTS;

AND

CLYDE SHIPBUILDING AND ENGINEERING COMPANY, LIMITED . } RESPONDENTS.

Contract—Impossibility—Outbreak of War—Scottish Law—Contract for Sale of Machinery—Failure of Consideration—Restitution—Claim for Repayment of Sum paid on Account of Contract Price.

By an agreement in writing dated in May, 1914, a Scottish shipbuilding company (therein called the contractors) agreed to supply to an Austrian shipbuilding company (therein called the purchasers) a set of marine engines and, "in consideration of the contractors supplying the engines in accordance with the terms of the agreement," the purchasers undertook to pay the agreed purchase money, which was to be paid by five stated instalments, the first being, "20 per cent. on signing contract." After payment of the first instalment the further performance of the contract became impossible by reason of the outbreak of war between Great Britain and Austria on August 12, 1914, on which date nothing had been done under the contract beyond the making of plans and the ordering of material.

In an action brought after the determination of the war by the

* *Present:* EARL OF BIRKENHEAD, VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

purchasers against the contractors for a declaration that the contract was abrogated by the existence of a state of war between Great Britain and Austria, and for repayment of the first instalment:—

Held, that by the law of Scotland the rule of restitution applied to a contract which had been abrogated by the outbreak of war, and that, the payment of the first instalment having been made in consideration of a supply of a set of engines which had not been supplied, the purchasers were entitled to repayment of the instalment on the ground of failure of consideration, subject to such counterclaim as might thereafter be established for work done under the contract.

Watson & Co. v. *Shankland* (1871) 10 M. 142; (1873) L. R. 2 H. L. Sc. 304 applied.

Chandler v. *Webster* [1904] 1 K. B. 493 discussed.

Decision of the First Division of the Court of Session in Scotland 1922 S. C. 723 reversed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland (1) recalling an interlocutor of the Lord Ordinary.

The action arose out of a contract dated May 4, 1914, between the respondents, a shipbuilding company carrying on business in Port Glasgow, and the appellants, an Austrian shipbuilding company carrying on business at Trieste.

By this contract the contractors (the respondents) agreed to supply and the purchasers (the appellants) agreed to purchase a set of marine engines. The contract further provided that the whole of the work which from time to time might be in hand under the agreement should become the absolute property of the purchasers, subject to any lien of the contractors for unpaid purchase money, and that "in consideration of the said contractors supplying the engines and their appurtenances entirely in accordance with the terms of this agreement, and the annexed specification," the purchasers should pay the sum of 11,550*l.* sterling, which should be paid by instalments as therein stated.

The first instalment was "20 per cent. on signing contract." This instalment (2310*l.*) was duly paid by the appellants.

On August 12, 1914, Great Britain declared war on Austria, and therefore the further performance of the contract became impossible. At this date nothing had been done by the

(1) 1922 S. C. 723.

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

respondents under the contract beyond the making of plans and the ordering of material.

After the determination of the war the appellants brought an action against the respondents for repayment of the 2310*l.* on the ground of failure of consideration.

The Lord Ordinary (Lord Hunter) declared that the contract was abrogated and avoided and dissolved by the existence of a state of war between Great Britain and Austria on August 12, 1914, and that the pursuers (appellants) were entitled to repayment of the 2310*l.*, subject to such counterclaim as might be afterwards established.

The First Division by a majority (the Lord President, Lord Skerrington and Lord Cullen; Lord Mackenzie dissenting) recalled the interlocutor of the Lord Ordinary and assoilzied the defenders (respondents) from the conclusions of the summons.

1923. May 10, 11. *Condie Sandeman D.F.* and *Normand* (of the Scottish Bar) for the appellants. The appellants claim to recover the first instalment on the ground of failure of consideration, as the respondents have not supplied the engines, and beyond preparing some plans have done nothing under the contract. The claim is based on the principle of restitution, which is founded on the maxim of the Roman law, nemo debet locupletior fieri damno alieno. In Scotland the rule of restitution on failure of consideration has been uniformly applied: Stair's Institutions I. vii. 7; Bell's Principles, s. 530; Erskine's Institutes III. i. 10; Dig. XII. iv. 3, 4, 5; Dig. XII. vii. 4; Dig. XIX. ii. 33; Monro's Justinian, vol. II., p. 299. Accordingly, by the law of Scotland, on a master's death during the currency of an apprenticeship, the apprentice has been held entitled to recover a proportion of the apprentice fee appertaining to the uncompleted portion of the apprenticeship: *Cutler* v. *Littleton* (1); *Hyslop's Case* (2); *Ogilvy* v. *Hume* (3); *Shephard* v. *Innes*. (4) But in England this rule does not apply: *Ferns* v. *Carr*. (5) So

(1) (1711) 2 Mor. 583.
(2) (1677) 2 Br. Supp. 520.
(3) (1683) 2 Br. Supp. 34.
(4) (1760) 2 Mor. 589.
(5) (1885) 28 Ch. D. 409.

also by English law, which differs in this respect from the law of every other nation of the maritime world, advance freight cannot be recovered by the charterer from the owner in the event of the loss of the ship and cargo. The decision of the majority of the First Division in this case was founded upon a misapprehension of *Leitch* v. *Wilson* (1), where by reason of the special terms of the contract a stipulation for the payment of freight before the completion of the voyage was enforced, notwithstanding that the vessel had been wrecked in the meantime. That case was explained by Lord President Inglis in *Watson & Co.* v. *Shankland* (2), where advance freight was treated as coming under the general rule of the civil law that if money is advanced by one party to a mutual contract on the condition that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance on the ground of failure of consideration. This principle was applied by Lord Dewar in the recent case of *Davis & Primrose* v. *Clyde Shipbuilding and Engineering Co.* (3) And see *Penney* v. *Clyde Shipbuilding and Engineering Co.* (4) The majority of the First Division relied upon the Coronation cases—*Chandler* v. *Webster* (5); *Blakeley* v. *Muller & Co.* (6); *Krell* v. *Henry* (7)—which are founded upon *Appleby* v. *Myers* (8), and lay down the principle that, where from causes outside the volition of the parties a contract has become impossible, the law treats everything that has already been done under the contract as validly done, but releases the parties from further performance of it, with the result that money already paid under it cannot be recovered as on a failure of consideration. Assuming that those cases are rightly decided, they have no application to Scotland and would have been decided the other way in that country.

(1) (1868) 7 M. 150.
(2) 10 M. 142, 152; 11 M. (H. L.) 51; L. R. 2 H. L. Sc. 304.
(3) 1917 1 S. L. T. 297.
(4) 1919 S. C. 363; 1920 S. C. (H. L.) 68.
(5) [1904] 1 K. B. 493, 499.
(6) [1903] 2 K. B. 760*n*.
(7) [1903] 2 K. B. 740.
(8) (1867) L. R. 2 C. P. 651, 660.

H. L. (Sc.) 1923 — CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

[They also referred to *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1); *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2); *Horlock* v. *Beal* (3); *Anglo-Egyptian Navigation Co.* v. *Rennie* (4); *Duke of Hamilton's Trustees* v. *Fleming.* (5)] By the law of Scotland the problem of the Coronation cases is solved by the doctrine of restitution. See per Lord Dunedin in *Sinclair* v. *Brougham.* (6) There is nothing in this contract to show that the money was paid for any other purpose than in consideration of the respondents supplying the engines.

Macmillan K.C. (of the Scottish Bar) and *MacKinnon K.C.* (of the English Bar) (with them *Macfarlane* (of the Scottish Bar)) for the respondents.*

This is an ordinary contract case, to be determined by the law of contract common to both countries. The law applicable to this case is stated by Lord Parmoor in *French Marine* v. *Compagnie Napolitaine d'Éclairage et de Chauffage par le Gaz* (7) as follows: "When the terms of a contract can no longer be carried out by either party, and there is no provision in the contract to meet this contingency, the contract cannot be treated as rescinded ab initio, but the parties are released from further performance. Thus, any payment previously made and any legal right previously accrued according to the terms of the agreement will not be disturbed, but the Courts will decline to construct a hypothetical contract by suggesting terms which were not within the intention of the parties when the contract was entered into." There is no authority for invoking the doctrine of restitution combined with a quantum meruit to the person against whom restitution is decreed. Restitution is known in England as in Scotland, but it has no application to a case of contract of this kind. Where an unforeseen occurrence ends the relation of the parties to a contract the loss is left

(1) [1918] A. C. 119.
(2) [1916] 2 A. C. 397.
(3) [1916] 1 A. C. 486.
(4) (1875) L. R. 10 C. P. 271.
(5) (1870) 9 M. 329.
(6) [1914] A. C. 398, 431–435.

* By arrangement between the counsel, with the consent of the House, Mr. MacKinnon delivered the leading argument.

(7) (1921) 27 Com. Cas. 69, 94.

to lie at the moment where it fell. Neither party can claim against the other. It happens that the balance is against the appellants, but it might well be the other way. The respondents might have done a great deal of work and might have been paid nothing. The offer to the respondents of a quantum meruit is not in accordance with the terms of any contract which they have entered into. The respondents' case does not stand or fall by the Coronation cases, but in *Chandler* v. *Webster* (1) Collins M.R. recognizes that a total failure of consideration would be a ground for recovery. Here there is no such total failure; there have been actings of both parties up to a certain stage. You cannot embark upon a nice adjustment of the rights of the parties when the outbreak of war puts an end to the relationship between them. No right of mutual accountability inter se was conferred upon the parties by the war. *Watson & Co.* v. *Shankland* (2), which was a case of advance freight, is distinguishable, because there was there a total failure of consideration, and Lord President Inglis there says: "If it were a payment of freight made in terms of the contract at the port of loading, it could never be recovered back at all."

Condie Sandeman D.F. in reply. The apprenticeship authorities show that the doctrine of restitution is not limited to a case of total failure of consideration.

[He referred to *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* (3); Buckland on Roman Law, p. 542.]

The House took time for consideration.

1923. July 25. EARL OF BIRKENHEAD. My Lords, the appellants are appealing against an interlocutor of the First Division of the Court of Session in Scotland dated July 20, 1922, reversing the interlocutor pronounced by Lord Hunter, the judge who tried the action brought by the appellants as pursuers against the respondents as defenders.

(1) [1904] 1 K. B. 493, 499. (2) 10 M. 142, 153.
(3) [1918] A. C. 239.

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

Earl of Birkenhead.

The action was brought for a decree that a contract between the parties dated May 4, 1914, had been abrogated by the outbreak of war, and that the appellants were entitled to repayment of a sum of 2310*l.* paid by them to the respondents under the terms of that contract. On July 7, 1921, Lord Hunter found in favour of the appellants, but on appeal the Lords of the First Division recalled his interlocutor and assoilzied the respondents from the conclusions of the action. The appellants now bring the matter before this House on appeal from the last-mentioned decision. The facts are shortly as follows :

On May 4, 1914, the appellant company, then an Austrian company carrying on a shipbuilding business at Trieste, in the Empire of Austria, entered into a written contract whereby the respondents (a British company carrying on business at Port Glasgow) agreed to supply and deliver f.o.b. at Port Glasgow and the appellant company agreed to purchase one set of triple expansion surface condensing screw engines. The contract made provision for the dimensions and other details, and for the date of completion. Clause 7 declared that the whole of the work, which from time to time might be in hand, should become the property of the appellant company subject to any lien there might be for unpaid money. Clause 9 is in these words : " In consideration of the said contractors " (i.e., the respondents) " supplying the engines and their appurtenances entirely in accordance with the terms of this agreement and the annexed specification, the purchasers " (i.e., the appellant company) " shall pay the sum of 11,550*l.* stg. (say, eleven thousand five hundred and fifty pounds sterling) which shall be paid in manner following," and the clause proceeds to require payment by stated instalments, the first being the sum of 2310*l.* now in question, which was made payable on the signing of the contract and was in fact paid on May 20, 1914.

Immediately after the signing of the contract, the parties commenced the preliminary work of designing the engines and preparing plans, etc. It would seem that the respondents had obtained or placed orders for materials for the set of

engines, which, however, was never made, as on August 12, 1914, the appellant company became alien enemies on the outbreak of war, and the contract became thereupon impossible of fulfilment.

It is not necessary to consider the effect of the Treaty of St. Germain-en-Laye or of the Treaties of Peace (Austria and Bulgaria) Act, 1920, and the Orders in Council made under that Act, for the reason that the appellant company became an Italian company, and its rights are not affected by the Treaty.

In these circumstances your Lordships are called upon to determine the rights of the parties according to the law of Scotland.

Authorities have been cited in support of the proposition that according to the law of England the sum of 2310*l.* so paid is not recoverable; and it has been argued that the law of England is the same as the law of Scotland in that respect. I do not propose to refer to those authorities. The question is as to the law of Scotland, and I desire to say nothing which may in any way fetter opinion if those authorities hereafter come to be reviewed by this House, for none of them is binding upon your Lordships.

In my opinion the appellants are entitled to succeed. The payment was made in consideration of the supply of the set of engines contracted for. These engines were never made, and consequently never supplied, and the contract has been put an end to without the fault of either party. The result is that the appellant company has got nothing in return for the payment of this money. The consideration was entire, for the instalments were all to be merely payments on account of the supply of the completed engines, and were not allocated to any particular stage, or the completion of any particular part, of the work. It was admitted that the whole sum of 11,550*l.*, if it had been paid, would have stood on the same footing, and consequently, if the respondents' contention were correct, they would be entitled to retain the price of machinery which they had not supplied and never would supply.

H. L. (Sc.)
1923
CANTIARE SAN ROCCO, S.A. v. CLYDE SHIP-BUILDING AND ENGINEERING CO.
Earl of Birkenhead.

In order to formulate the rule applicable to this case it is necessary to consider first the Roman law as a source of Scottish law, and secondly the Scottish authorities, which show how far the Roman law applicable to this topic has been received and applied in the law of Scotland.

First, as to the Roman law. This is treated in the Digest and other authoritative texts in connection with the procedure known as Condictio. This process was available to recover money or things which had been parted with by the owner at such time as he became entitled to reclaim them. The Condictio was only a single form of action, but it was grouped or classified in various ways, according to the kind of property or according to the causa which gave occasion for recourse to the Condictio; but it is unnecessary to go into the origin and development of this remedy. As expounded in Justinian's Digest the law was as complete and logical as possible, having regard to the jurisprudence and customs of the times and the fact that that law was the result of a long and gradual development. Justinian's legislation was partly formative and partly expressive of that part of the Roman law which in this connection was received into the Scottish system.

The underlying principle of the Condictio was that a person had received from another some property, and that by reason of circumstances existing at the time, or arising afterwards, it was or became contrary to honesty and fair dealing for the recipient to retain it. The particular case which is in point is the Condictio causa data causa non secuta. This forms the subject-matter of the Digest, Book XII., Title IV. In the Code the corresponding title (Book IV., Title VI.) bears the rubric De condictione ob causam datorum. The expression "Condictio causa data causa non secuta" is apparently an invention of Justinian's jurists, for it is not to be found elsewhere, and an exact translation is not easy. The difficulties to which the phrase gives rise led the late Mr. Roby to substitute in his Roman Private Law (Vol. II., p. 77) the expression "Condictio ob rem dati, re non secuta." It is, however, sufficient for my present purposes to translate the

expression by the words "Action to recover something given for a consideration which has failed." In the text of the Title a number of instances are cited where the donor was entitled to this remedy if he changed his mind before it was too late. In such a case the Condictio was available and accordingly the matter is logically included, and the texts upon it have given rise to very difficult problems. Such instances arise in connection with donations; for a case such as the present they are not relevant, and I accordingly disregard them.

Apart from the last-mentioned instances, where the donor was allowed a locus pœnitentiæ, the Condictio causa data was competent where a person who had given something for a future lawful purpose which had not been realized sought to recover from the recipient what the latter had received. As a rule, the pursuer in such a case had given a present consideration for a future performance, but the Condictio was also available in other matters, such as the giving of a sum of money to form a dowry on the occasion of a marriage then in contemplation but afterwards broken off.

The rule may, I think, be fairly stated thus: A person who had given to another any money or other property for a purpose which had failed could recover what he had given, unless there had been no fault on the recipient's part and he had not been enriched thereby. If the recipient had been enriched, then he would, if the purpose failed, and he retained the property, be acting unjustly, and consequently he was under an obligation to return it. It was open to him to show, not merely that he had not been enriched at all, but also, if such were the fact, that though enriched he had not benefited to the full value of the property. Such would be the case if the property had been lost or damaged without blame attaching to him. Such being the Roman law as embodied in the Corpus Juris Civilis, it now becomes necessary to examine the application of the rule in Scotland.

Lord Stair's Institutes, Book I., Title VII., para. 7 (p. 71 of 4th ed. by Brodie), states the rule in these terms: "The

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

Earl of Birkenhead.

duty of restitution extendeth to those things, quae cadunt in non causam, which coming warrantably to our hands, and without any paction of restitution, yet if the cause cease by which they become ours, there superveneth the obligation of restitution of them; whence are the condictions in law, sine causa, and causa data, causa non secuta, which have this natural ground, and of which there are innumerable instances; as all things that become in the possession of either party in contemplation of marriage, the marriage, which is the cause, failing to be accomplished, the interest of either party ceaseth, and either must restore. . . . ."

This statement is adopted by Bankton (Book I., Title VIII., p. 215) and by Erskine. The latter, however, added a sentence (Book III., Title I., para. 10) which has caused much discussion and difficulty in this case. He wrote: "If it has become impossible that the cause of giving should exist by any accident not imputable to the receiver, no action lies against him, unless he hath put off performing it, when it was in his power to perform, before that accident happened." He cited as authority Digest XII. 4, l. 5, para. 4. I have had the advantage of reading Lord Shaw's explanation of this obscure sentence. It may well be that he is right, but I do not consider it incumbent upon this House to determine exactly what Erskine had in his mind, for it is beyond doubt that he could not have intended to controvert Lord Stair's statement of the law which he had wholly adopted in the sentences immediately preceding.

In Bell's Principles (s. 530) the general rule is set out in agreement with the three earlier writers without the proviso or qualification which Erskine added. The law is laid down in these words: "One who by mistake has received anything (as from a carrier) is liable to restitution; and so one to whom a thing has been transferred, or an obligation undertaken and fulfilled, on a consideration which has failed, is also liable to restitution under the condition, causa data causa non secuta."

I do not find it necessary to discuss the earlier cases which have been cited in argument, for in *Watson & Co.* v.

Shankland (1) Lord President Inglis delivered a celebrated judgment which has since been regarded as an authoritative statement of the law. He said: "The general principles of law applicable to the contract of affreightment are not essentially different from those applicable to other similar contracts, such as contracts of land carriage, or building contracts, or any others, in which one party agrees to pay a certain price as the return for materials furnished or work done, or services rendered by the other party. No doubt maritime contracts are juris gentium"; and he then deals with special meanings placed upon words and phrases by mercantile custom, and continues: "There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this—that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a condictio causa data causa non secuta, or a condictio sine causa, or a condictio indebiti, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts. If a person contract to build me a house, and stipulate that I shall advance him a certain portion of the price before he begins to bring his materials to the ground, or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part, or any available part, of his contract. No doubt, if he perform a part and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am lucratus by his materials and labour, but no further; and if I am not lucratus at all, I shall be entitled

(1) 10 M. 142, 152.

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

Earl of Birkenhead.

to repetition of the whole advance, however great his expenditure and consequent loss may have been."

The judgment in that case was affirmed with variations. (1) Lord Dewar in a recent case, similar to the present, applied the doctrine in the same sense as Lord President Inglis : see *Davis & Primrose* v. *Clyde Shipbuilding and Engineering Co.* (2)

So far as I am able to form an opinion, neither the Roman law nor, before the recent war, the Scottish law had considered expressly how far the principles which I have examined apply to a contract which has been abrogated by the outbreak of war. In the present instance neither party was in fault, nor was there any object in existence in which the property could pass. The contract was not abrogated ab initio, and consequently there can be no question of restitution in integrum. The only alternatives are either that the parties are left in the position in which they were at the outbreak of war, or that the party who paid and has received no benefit is entitled to some measure of relief. The remedy now sought is not an action on the contract, but is independent of it. On principle I cannot see any reason for holding that the outbreak of war leads to any result different from that which follows, as I have shown, from any other act or event beyond the control of the parties. There has been a payment on account of the supplying of the complete set of engines, not a payment for any particular part or stage ; so that there was no allocation to any specific thing to be done or made. The set of engines has not been supplied, and for the failure to supply no one is to blame. There has been in fact a causa non secuta. Neither on principle nor on authority can I find any sound reason for holding that there is any exception to the general rule of such a nature as to avail the respondents. On the contrary, to apply the general rule to the circumstances of this case is in my opinion in accordance with the true principles of Scottish law, for any other result would leave the respondents with money paid to them for a purpose which has failed.

(1) L. R. 2 H. L. Sc. 304; 11 M. (H. L.) 51. (2) 1917 1 S. L. T. 297.

For these reasons I move that the interlocutor appealed against be recalled and the interlocutor of Lord Hunter restored, and that the respondents pay the costs.

VISCOUNT FINLAY (read by EARL OF BIRKENHEAD). My Lords, the first appellant, an Austrian shipbuilding company, entered into a contract with the respondents, a Scottish engineering company, by which the respondents were to manufacture and supply a set of marine engines to be delivered f.o.b. at Port Glasgow within twelve months. The contract price was 11,550*l.*, to be paid as follows: "By cash in London—20 per cent. on signing contract; 20 per cent. when the cylinders are cast and boiler plates are in contractors' premises; 20 per cent. when the boilers are tested and engine assembled; 30 per cent. nett cash in London in exchange for signed bills of lading, and policies to cover insurance; 10 per cent. after reception of engine and boilers and satisfactory trials."

The contract was made on May 4, 1914. On August 12, 1914, war broke out between Great Britain and Austria. At that time the respondents had received payment according to contract of the first instalment of the contract price, amounting to 2310*l.* due on the signing of the contract. By the outbreak of war the further prosecution of the contract became illegal and impossible. Before August 12 the respondents had done a good deal of preparatory work in making general and detailed plans and calculations, and detailed specifications, in ordering material and in making certain modifications and alterations desired by the appellants, but the construction of the boilers had not been begun.

On February 18, 1921, after the conclusion of peace, the appellants brought an action against the respondents for the recovery of the 2310*l.* The case came before Lord Hunter as Lord Ordinary, and he, by an interlocutor of July 7, 1921, found that the contract was abrogated by the war and that the appellants were entitled to repayment of the 2310*l.* by way of restitution (subject to respondents' counterclaim for work done), on the principle of the condictio causa data causa

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

Viscount Finlay.

non secuta of the Roman law. The case was taken on appeal before the First Division. The decision of the Lord Ordinary was reversed, the Lord President (Lord Clyde), Lord Skerrington and Lord Cullen being of opinion that the Lord Ordinary's interlocutor should be recalled and the defenders assoilzied. Lord Mackenzie dissented, being of opinion that the judgment of the Lord Ordinary ought to be affirmed on the ground that there had been failure of the consideration upon which the money was paid.

Your Lordships have had the advantage of a very interesting and learned argument upon the law of Rome, as well as the laws of Scotland and of England. The appellants contend that they had a right by the law of Scotland to restitutio, the further performance of the contract having become impossible. They did not dispute that, if the question fell to be decided by the law of England, the respondents would have been entitled to keep the money, but challenged the doctrine of the English law on this point as being at variance with the Roman law, on which the law of Scotland is founded, and with the law of Scotland itself.

As regards the law of England, the statement of principle to be found in the judgment of Collins M.R. in *Chandler* v. *Webster* (1) was relied on by the respondents. He says: " that, where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the contract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration

(1) [1904] 1 K. B. 493, 499, 501.

does not apply. The rule adopted by the Courts in such cases is I think to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it."

The point is very clearly put by Romer L.J. He says: "Where there is an agreement which is based on the assumption by both parties that a certain event will in the future take place, and that event is the foundation of the contract, and, through no default by either party, and owing to circumstances which were not in the contemplation of the parties when the agreement was made, it happens that, before the time fixed for that event, it is ascertained that it cannot take place, the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement; but, except in cases where the contract can be treated as rescinded ab initio, any payment previously made, and any legal right previously accrued according to the terms of the agreement will not be disturbed."

The case of *Chandler* v. *Webster* (1) was one of many cases which arose out of the postponement of the Coronation of King Edward VII., and questions have been raised as to some of these cases into which it would be out of place at present to enter. The principle of English law was re-stated with great clearness by Lord Parmoor in the case of *French Marine* v. *Compagnie Napolitaine d'Éclairage et de Chauffage par le Gaz.* (2) This statement forms no part of the judgment of the House of Lords in that case, but there is no doubt that the principle has been repeatedly acted on in the Court of Appeal.

The question, however, in the present case is as to the

(1) [1904] 1 K. B. 493. (2) 27 Com. Cas. 69, 94.

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

Viscount Finlay.

law not of England but of Scotland. The appellants contend that the doctrine of restitutio forms part of the law of Scotland, and that the principles of the civil law on this subject are by the law of Scotland applicable to the present case. They maintain that on the one hand the instalment paid must be accounted for to the appellants, as the contract was frustrated, while, on the other hand, the respondents are entitled to retain so much of it as is adequate to compensate them for the expense they incurred and the work they did in preparing for the construction of the boiler. Though there was no lucratio accruing to the appellants thereby, the doctrine of restitutio involves, it may be said, that the respondents should not be out of pocket by their part performance of the contract.

During the argument the appellants appealed to the locus classicus in Lord Stair's Institutions, Book I., tit. 7, para. 7: "Sixthly, The duty of restitution extendeth to those things, quæ cadunt in non causam, which coming warrantably to our hands, and without any paction of restitution, yet if the cause cease by which they become ours, there superveneth the obligation of restitution of them; whence are the condictions in law, sine causa, and causa data, causa non secuta, which have this natural ground, and of which there are innumerable instances; . . . ."

The appellants also referred to Erskine's Institutes, III. i. 10, where it is laid down that things given in the special view of a certain event must, if the event in the view of which they were given should not afterwards exist, be restored. Erskine adds: "If it has become impossible that the cause of giving should exist by any accident not imputable to the receiver, no action lies against him, unless he hath put off performing it, when it was in his power to perform, before that accident happened." The authority cited for this proposition is Digest XII., tit. 4, l. 5, § 4. The appellants appear to have felt some apprehensions as to the effect of this sentence in Erskine (see their Case); they suggest that it must be read by the light of the authority cited for it, and the other passages in the Digest, Book XII.,

tit. 4, but it seems to me difficult to find a satisfactory explanation of the language of this sentence. There was some discussion at the Bar as to what was meant by the references in the Digest, under this title, to a jus pœnitendi. I find that the nature of this right, now obsolete, is fully explained in Mackeldey's Systema Juris Romani Hodie Usitati, ed. 1847, s. 409, and in M. Ortolan's Explication Historique des Instituts, ed. 1863, Vol. III., pp. 337–8, para. 1600. The appellants also cited Bell's Principles, s. 530, as to the liability to restitution where a thing had been transferred on a consideration which failed, and to the general statement of the doctrine of restitution in Bankton, p. 215.

A good many passages from the Digest, Book XII., tit. 4, and tit. 7, were cited in the course of the appellants' argument, and are set out in the appellants' case. Similar questions have often arisen as to prepayment of freight. Our attention was particularly drawn to the case of *Leitch* v. *Wilson* (1) and to the case of *Watson & Co.* v. *Shankland* (2), and especially to the judgment of the Lord President in the latter case, and to the singularly lucid judgments of Lord Neaves in both of them. There is a difference between the law of Scotland and that of England as to the right to have prepaid freight returned in the absence of expressions in the instrument from which the intentions of the parties on this subject may be inferred.

I do not think it would serve any useful purpose to discuss such cases as *Cutler* v. *Littleton* (3), the circumstances of which are very remote from the present. In my opinion the result of the authorities is that the doctrine of English law on this subject as expounded in the judgments of the Court of Appeal in England is at variance with the law of Scotland. It may be said that the English view provides a rule which, while perhaps rough and ready, is very convenient in practice and works fairly where the money is paid by instalments as the work progresses. But on the other hand

(1) 7 M. 150.
(2) 10 M. 142; 11 M. (H. L.) 51.
(3) 2 Mor. 583.

H. L. (Sc.) 1923 — CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO. — Viscount Finlay.

the Scottish doctrine of restitutio ascertains more accurately the rights of the parties respectively, and the results of the English view might be startling if the whole contract price had been paid in advance. The question, however, is not as to the comparative advantages of the two rules of jurisprudence. The only point we have to determine is which of them is in accordance with the law of Scotland. I cannot find that the English doctrine has ever been incorporated with the law of Scotland. It would be unfortunate that in matters of this kind, which may, as here, affect foreigners, the results should be different in the two parts of Great Britain. But we must apply the law of Scotland in a Scottish case, and in my opinion the conclusion arrived at by the Lord Ordinary and by Lord Mackenzie was in conformity with the law of Scotland.

I think the decision of the Inner House should be recalled and that of the Lord Ordinary restored.

LORD ATKINSON. I concur in the judgment delivered by my noble and learned friend on the Woolsack (Earl of Birkenhead), and I now read the opinion of my noble and learned friend Lord Dunedin, in which I also concur.

LORD DUNEDIN. Before preparing the opinion I am about to deliver, I had the great advantage of perusing the opinion just delivered by Viscount Finlay and that about to be delivered by Lord Shaw. These opinions, with which in the result I agree, absolve me from delaying your Lordships by repetition of what has been well said by others. Viscount Finlay has given the facts, and I need not recapitulate them. Lord Shaw has traced with great precision and accuracy, if I may respectfully say so, the origin of the doctrine in the Roman law to which the appellants appeal. After all, however, the Roman law, though interesting, is only of service as showing the foundation on which the Scottish law rests. The real question must always be what is the law of Scotland. Let me therefore first say a word on the Scottish authorities. The locus classicus is the citation from Stair

set out by Viscount Finlay. Keeping chronological order, we next have Bankton, who is to the same effect. Then comes Erskine, who states the general proposition in terms almost identical with the words of Stair, but appends a qualification on which the respondents not unnaturally found. "If it has become impossible that the cause of giving should exist by any accident not imputable to the receiver, no action lies against him unless he hath put off performing it, when it was in his power to perform, before that accident happened." As authority he cites a passage of the Digest. We were favoured with a learned argument by Mr. Normand, which in effect came to this, that, if you look narrowly at the passage of the Digest cited, you will come to the conclusion that Erskine, thinking of particular and indeed peculiar instances, expressed a qualification appropriate to them in terms too general. Lord Shaw has hazarded another explanation of his own, ingenious indeed, but which I am bound to confess, though it gives me the key to the mind of my noble and learned friend, leaves me in doubt as to that of Erskine. I therefore reluctantly remain in doubt as to what Erskine exactly meant when he penned that sentence. But I permit myself two remarks. The first is that when he wrote his Principles he expressed the general doctrine as put by Stair without any qualification, Pr. III., i. 5. The second is that I am clearly of opinion that the qualification must be taken in some limited sense or it is erroneous. For, if taken literally, according to its full meaning, it would really for practical purposes annihilate the general doctrine. Take the very first instance which both Stair and Erskine put in the forefront of example—a sum given in contemplation of marriage. Suppose a friend gives to an intending bridegroom a sum of money for the purpose of settlement on the marriage. The lady dies or jilts him. For neither of these events is he responsible. Can it be supposed that he is to keep the money unless it were possible to turn the tables on him by showing that he had been guilty of undue procrastination in the calling of his banns? And then last comes George Joseph Bell, who unhesitatingly adopts the dictum

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

Lord Dunedin.

of Stair without qualification. These citations exhaust the institutional writers.

When we come to judicial exposition, we have the well-known passage of Lord President Inglis' judgment in *Watson & Co.* v. *Shankland.* (1) This has been universally looked upon since its date as expressing the law of Scotland : " There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this—that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a condictio causa data causa non secuta, or a condictio sine causa, or a condictio indebiti, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts. If a person contract to build me a house, and stipulate that I shall advance him a certain portion of the price before he begins to bring his materials to the ground, or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part, or any available part, of his contract. No doubt, if he performs a part and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am lucratus by his materials and labour, but no further ; and if I am not lucratus at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been."

It follows from this that if there is anything well settled in the law of Scotland it is that one of the forms of the action of repetition is condictio causa data causa non secuta. I forbear to criticize the Latinity, as the meaning is plain

(1) 10 M. 142, 152.

enough. And it is equally plain that this doctrine is applied to contracts, as well as to prestations which have their origin in donation and not in contract. The application to the facts of the present case seems equally clear. The appellants paid 2310*l.* in order to get engines. They did not get the engines; therefore, they ask for the 2310*l.* back. It is not breach of contract. If it were they would be entitled not only to the 2310*l.* but to damages as well. It is a claim which arises in connection with the contract but is not founded upon the contract.

What then is the argument on the other side? It is twofold. First it may be summarized as the law of the Coronation cases. Secondly it is based upon what has been decided by your Lordships' House, that when a contract has been rendered impossible of performance owing to the party to it becoming an alien enemy, then the contract itself is not avoided, it only becomes incapable of future performance, but accrued rights remain.

First as to the Coronation cases. None of these cases reached your Lordships' House, and it has been mooted that some at least of them were wrongly decided. I do not propose to consider any such question. Perhaps some day I may have to do so; but for the moment, sitting as a judge of Scottish law alone, I assume they were rightly decided. I can, however, confidently affirm that some of them at least would have been decided otherwise in Scotland. Let me take, as an example, *Chandler* v. *Webster*. (1) The facts are simple. A house owner let a window for seats to view the Coronation procession. 141*l.* was contracted to be paid before the date of the procession. The procession did not take place. 100*l.* had been paid, leaving 41*l.* still unpaid. The parties mutually sued; the house owner to get the 41*l.*, the taker of the seats to get repayment of the 100*l.* and dismissal of the suit for the 41*l.* The house owner was successful on both points. Now, of course, that result might be reached if the contract had been construed as a contract to take a window for seats on a certain day, the

(1) [1904] 1 K. B. 493.

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIP-BUILDING AND ENGINEERING CO.

Lord Dunedin.

taker trusting to his own information to satisfy himself that if he had these seats on a certain day he would see a Coronation procession. But that was not the view of the contract taken by the Court. The Court held that the contract was for seats to view the procession. If that were so, then, according to Scottish law, the 100*l.* ought to have been returned and the 41*l.* found not to be due.

I cannot help thinking that the angle of view, if I may so phrase it, from which an English or a Scottish judge would look at such a question is different; and that the cause is to be sought in the reluctance of the English law to order the repayment of money once paid. I do not enlarge on the topic, for I am not at all concerned to criticize English law. But if any one will take the trouble to peruse the very able and exhaustive opinion delivered by Lord Sumner in the *Birkbeck Bank Case* (*Sinclair* v. *Brougham* (1)), on the limits of the action for money had and received, and will also, if I may venture to say it, read my own opinion in the same case as to how the same problem is attacked in systems founded on the Roman law, they will understand what I mean. For the purpose of this case it is sufficient to say, as I unhesitatingly do, that *Chandler* v. *Webster* (2), if it had been tried in Scotland, would have been decided the other way.

The other argument is, at first sight, more formidable, for it is founded on what has been said in your Lordships' House. There is undoubtedly ample scope for this proposition that when, owing to the war, the further continuance of a contract became impossible, the result is not to sweep the contract out of existence, but simply to prevent further performance so that accrued rights remain. But then comes the question, what is an accrued right—or, to put it otherwise, does that proposition at all prevent the application of the remedy given not under the contract, or because of breach of the contract inferring damages, but in respect of the equitable (of course I am not using the word in the technical English sense) doctrine of condictio causa data

(1) [1914] A. C. 398. (2) [1904] 1 K. B. 493.

causa non secuta ? I think it does not, nor do I think that the true sense of "accrued" means simply all that may have happened. And that brings me to the very short point on which, in my view, the whole case turns. Was the 2310*l.* paid in respect of the signing of the contract ? If it were, then it cannot be said that there was a causa non secuta. In other words, if the 2310*l.* had been conditioned to be paid *for* signing the contract, my opinion would have been different. But it is not so. It is to be paid *on* signing the contract. It had, indeed, no separate existence. It is only an instalment of the total price which is the consideration for the whole engine. There is no splitting of the consideration.

Two other remarks I should make before I conclude. There was no passing of the property at certain stages: indeed, there never was in existence a property to pass. So that all cases which turn on rei interitus are beside the mark.

Mr. Macmillan seemed much troubled with the idea that there was no restitution in integrum. But restitution in integrum does not enter into the question. That is the price for being allowed to set aside a contract. Here, as I have already said more than once, the contract is left standing; the doctrine of repetition works independently of it.

LORD SHAW OF DUNFERMLINE (read by EARL OF BIRKENHEAD). In the course of the judicial pronouncements in this case, there have been repeated citations made from the contract between these parties; and the facts have been enumerated more than once. I am very unwilling to add anything which I can avoid to these particulars, none of which stand in question. My narrative of these can be short accordingly. But the important citations as to the legal principles involved may have to be given or even repeated with more fulness.

By the agreement made between the parties on May 4, 1914, the respondents agreed to supply and deliver f.o.b. Port Glasgow, and the appellants agreed to purchase, a set of engines. By art. 7 of the contract the whole of the work which from time to time might be in hand was to become the absolute property of the purchasers, subject only to the

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

Lord Shaw of Dunfermline.

lien for unpaid money in favour of the contractors. Art. 9 already quoted is, of course, the important clause in the contract. By it the price to be paid was fixed at 11,550*l.* sterling. This price was to be paid in five different instalments, beginning with the signing of the contract and ending with the satisfactory trials of the engines and boilers after reception.

It is the first of these instalments which alone is in question—namely, the sum of 2310*l.*, being 20 per cent. on the 11,550*l.* The contract was dated on May 4, on which date the 20 per cent. was paid.

The parties had had previous business relations; and it appears that the engines contracted for were substantially a repetition of a former order. It was necessary, however, to have some drawings made and certain preparatory work done; and correspondence ensued. There are items of cost naturally arising from the doing of this, and they are relatively small. But, when that is said, then the whole operations performed by the contractors have been described.

The important fact of the case is that the engines were never made, either in whole or in part, and therefore no res came into existence. The reason for this was that on August 12, 1914, war was declared between Great Britain and Austria; and the case has been treated before your Lordships' House, as in the Courts below, on the view that the appellants on that date became alien enemies, and that, as Lord Hunter put it, "the contract became eo ipso abrogated, and avoided, and dissolved."

The question in the case is, what is to become of the 2310*l.* which was given for something, but for which nothing was got in return? Is it to remain in the pockets of the builders who built nothing, or is it to be given back to the purchasers who got nothing?

I cannot avoid feeling that any Scottish judge would have decided this case in favour of the appellants on principles well known to the Roman law, and also for at least over two centuries embodied in the law of Scotland, had it not been for the intrusion of ideas derived from English law, and from

principles which are neither Scottish nor Roman, and which, as I shall show, are viewed with uncertainty, even in England itself.

I think the law of Rome was accurately stated to the House by Mr. Normand. But before I deal with the Roman texts, I desire to make it clear that in my opinion this is not a case in which any argument is possible as to whether the Roman and Scottish law should or should not apply to it on account of some speciality in the case itself. On the contrary, this is a plain and typical case of restitution. The thing which was to spring into being never existed, and it was that thing in respect of which alone the part payment of the price was made. The language of s. 9 of the contract is perfectly general: "In consideration of the said contractors supplying the engines and their appurtenances entirely in accordance with the terms of this agreement, the purchasers shall pay the price of 11,550*l.*, which shall be paid in the manner following,—by cash in London, 20 per cent. on signing contract," the other percentages following as already described. There is no splitting up of consideration. The price is to be paid "in consideration of the engines being supplied," and the 20 per cent. on signing the contract is one of the items impressed within that general expression. The consideration, as a whole, stands with reference to the price and every part of the price.

It is an admitted fact in the case that that consideration has entirely failed. Therefore, this, as I say, would be a typical case of restitution under the Roman law and one for the application of the maxim causa data causa non secuta. The condictio under that head would have been, in my humble opinion, plainly applicable. If not applicable to this and to similar cases of outstanding simplicity, then the whole chapter of the Roman law devoted to that condictio need never have been written.

I observe from the judgments in the Court below, that some comment is made upon the language employed for the Title; and, so far as words go, it is admitted by scholars not to be entirely apt. I am happy to cite, in connection

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

Lord Shaw of Dunfermline.

with this topic, the views of that great scholar and Latinist, Mr. Roby. He deals in his observations in the fifth chapter of his Roman Private Law, book V., chap. 3, on Condictiones, with this one, which he thus names ; he calls it the " Condictio ob rem dati, re non secuta," and he explains that the name which he has given is taken from Celsus and Paul. He identifies it, however, of course, with the rubric of Digest XII. 4, of which he says : " In the rubric of Digest XII. 4, this is called 'Condictio causa data causa non secuta,'" a phrase, he says, not elsewhere found and difficult to explain. In Cod. IV. 6, the rubric " de condictione ob causam datorum," points to the meaning that the action is for recovery of what has been given for a purpose which has failed.

And upon the substance of the matter I desire to quote the quite remarkable exposition of the condiction which Mr. Roby gives, remarkable because it expresses not only the true foundation, but almost the precise limits and extent of the principle involved ; and it does so in language which is, according to my view, entirely consistent with the development of the doctrine in the law of Scotland. His language is as follows :—

" 1. Condictio ob rem dati, re non secuta, i.e. a condiction for something handed over for a purpose which has failed, e.g. for the emancipation of a son, or manumission of a slave, or for securing a dowry, or settlement of a law suit, or as a condition of acceptance of a legacy or inheritance. If the son or slave is not freed, or the marriage does not take place, or the suit is pressed on, or the inheritance is not accepted, or the will is upset, the money or other property passed can be recovered, as a rule, subject to exception in cases where there is no fault on the recipient's part, and he has not, in fact, been enriched by the transfer."

The last clause is also in my view of the principle of the law of Scotland correct. Unjust enrichment, i.e. enrichment by reason of the thing being received and the consideration and return failing—the principle of preventing that underlies as a reason the doctrine of restitution.

The actual text in which this condiction : " to recover a

thing given for a consideration where the consideration fails" is treated with much analytical elaboration and citation of illustrative cases is Digest XII., tit. 4. Among the illustrations occur cases where the considerations were given purely as donations which, not having been implemented, could be recalled. They have not been followed out to the stage of performance—such as money supplied for the enfranchisement of a favoured slave, but still unexpended. And in such cases the money can be claimed back on the double ground of: (1.) the consideration (enfranchisement) not having been carried through (the slave may have meantime died); or (2.) the donor may have seen cause to change his mind and his pœnitentia, intimated to the donee to whom the money had been given to procure the manumission, operates with the same result—again the cause is non secuta. This latter case, I incline to think, has caused most of the discussion, as, at first sight, locus pœnitentiæ seems foreign to the topic. But so far as the first ground is concerned, that is fundamental, and no question or doubt of it can be raised in Roman law.

This appears over and over again as the basis of the doctrine. That basis is simply honesty. Good illustrations of this occur in title "De condictione sine causa" of the same book XII., Tit. VII. I cite in particular two passages, one from Ulpian and one from Africanus. Says Ulpian, s. 2: "Sive ab initio sine causa promissum est, sive fuit causa promittendi quae finita est vel secuta non est, dicendum est, condictioni locum fore. Sect. 3 Constat, id demum posse condici alicui, quod vel non ex justa causa ad eum pervenit vel redit ad non justam causam." Whether, in short, says the law, the thing was not honestly got or is not honestly kept, in either case it must be restored.

Africanus, in s. 4 of the same title, is quite as clear and comprehensive: "Nihil refert, utrumne ab initio sine causa quid datum sit an causa, propter quam datum sit, secuta non sit." In short, if the consideration given has failed, it is just the same as if the thing was given sine causa altogether, and restitution must take place.

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

Lord Shaw of Dunfermline.

But, even should my interpretation of these texts be wrong, I wish to say that it is plainly the interpretation which the law of Scotland has adopted for centuries.

Stair mentions the doctrine thus (I. 7, 6): "The duty of restitution extendeth to those things, quae cadunt in non causam, which coming warrantably to our hands, and without any paction of restitution, yet if the cause cease by which they become ours, there superveneth the obligation of restitution of them; whence are the condictions in law, sine causa, and causa data, causa non secuta, which have this natural ground, and of which there are innumerable instances; as all things that become in the possession of either party in contemplation of marriage, the marriage, which is the cause, failing to be accomplished, the interest of either party ceaseth, and either must restore. . . . ."

Bankton, in one sentence, echoes this, and the last clause, which I cite, is observable: "Where the cause of the delivery ceases, the thing must be restored to the giver: hence were introduced, by the law, the several condictions, sine causa, causa data non secuta, etc., as things given in contemplation of marriage, which does not follow; a bond given in hopes of getting the money which is not delivered, and *every deed or grant that depends upon mutual consideration, not given or performed, must be restored to the granters.*"

Erskine, III. i, 10, treats the topic thus: "Under this class may also be reckoned those obligations which arise from the natural duty of restitution. In consequence of this, whatever comes into our power or possession which belongs to another, without an intention in the owner of making a present of it, ought to be restored to him. . . . . From this duty of restitution it ariseth, that things given in the special view of a certain event, ex. gr. in the contemplation of marriage, must, if the event, in the view of which they were given, shall not afterwards exist, be restored by the grantee, who may be sued for restitution by personal action, styled in the Roman law, Condictio causa data, causa non secuta: L. 3. § 2. etc., De cond. caus. dat."

Then a sentence follows which has caused difficulty in the

Courts below, and which is not very clear. It is: "If it has become impossible that the cause of giving should exist by any accident not imputable to the receiver, no action lies against him, unless he hath put off performing it, when it was in his power to perform, before that accident happened; L. 5. § 4. eod. tit."

I cannot, myself, see that this sentence negatives the adoption either of the law of Rome as sketched, or of the interpretation thereof by Stair and Bankton as given. My conjecture is that Erskine, in the sentence under review, was dealing with the situation not of giving the thing, but of giving it back, and that his view was that if there was an impediment to giving it back on account of its having disappeared in the meantime, without any fault upon the part of the receiver, then a different principle might have to apply; because one might have to take into account that the reason for giving it back could not be accomplished because it itself had been withdrawn from the province of restoration by some supervening incident for which the holder, so to speak, for the time being, could not be charged with responsibility. The general doctrine as stated in the major passage in Erskine is, of course, however, in entire accord with that of Stair and Bankton. And then, my Lords, Bell in his usual concise and compendious fashion puts the law plainly thus in his Principles (s. 530): "GOODS GOT BY MISTAKE, ETC.—One who by mistake has received anything (as from a carrier) is liable in restitution; and so one to whom a thing has been transferred, or an obligation undertaken and fulfilled, on a consideration which has failed, is also liable to restitution under the condition, causa data causa non secuta."

So far for the institutional writers. Upon the decisions, the old and curious apprenticeship case may be noted as recognizing in somewhat complex circumstances the true principle of the doctrine of restitution. The law of Scotland, as, indeed, the law of Rome, anxiously endeavoured to disentangle a complex situation so as to make restitution exactly fit the case, and restore both parties as nearly as

H. L. (Sc.) 1923 CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO. Lord Shaw of Dunfermline.

possible to the position which they would have occupied before the unexpected interruption or calamity occurred. This principle has been long established by decided cases. I cite, without giving the quaint details mentioned in other reports, *Ogilvy* v. *Hume* (decided in February, 1683), as set out in 2 Brown's Supplement, p. 34. It appears thus: "In a pursuit at the instance of the representatives of an apothecary, for payment of a bond for apprentice fee, granted to the defunct by his apprentice,—it was alleged, That the apprentice having been bound for five years, his master died after he had served but three years, a proportion of the fee ought to be retained, as causa data non secuta. Answered for the pursuers, That, after three years, in which time the apprentice had sufficiently learned his trade, the want of his future service was only prejudicial to the master. The Lords allowed retention of a proportion, which was modified."

But I am unwilling to labour these cases, because the law of Scotland may be said for over half a century to have stood expounded with unquestioned authority by Lord President Inglis in *Watson & Co.* v. *Shankland.* (1) I am sorry to make repetition, but I think it necessary to cite to the House again the text of that powerful exposition on the question. Until this case occurred the principle laid down by that most distinguished judge has never been doubted, if it has been doubted now. I observe that Lord Dewar, in a comparatively recent case of *Davis & Primrose* v. *Clyde Shipbuilding and Engineering Co.* (2) had to apply the doctrine, which he did exactly in the sense used by the great Lord President.

The Lord President explained that although the particular question arose under a charterparty, its settlement depended on principles with a much wider range: "The general principles of law applicable to the contract of affreightment are not essentially different from those applicable to other similar contracts, such as contracts of land carriage, or building contracts, or any others, in which one party agrees to pay a certain price as the return for materials furnished or work done, or services rendered by the other party. No

(1) 10 M. 142, 152. (2) 1917 1 S. L. T. 297.

doubt maritime contracts are juris gentium; and if the custom of the mercantile community of nations has impressed on certain words or phrases in a contract of affreightment a special meaning and effect, different from what they would bear if construed according to the ordinary legal rules of construction, the consuetudinary rule of the maritime law must prevail. But to establish such a rule of maritime law there must be the general consent of the maritime nations of the world, expressed in the prevailing practice and understanding of the traders of these nations. There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this—that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a condictio causa data causa non secuta, or a condictio sine causa, or a condictio indebiti, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts."

It is true that since that judgment was pronounced a good deal has happened in England to make or to widen the breach between the English practice and that of Scotland and other nations. The particular instance of divergence noted in that case in regard to this principle was as to advance of freight. On which subject the Lord President referred to the practice of "all the nations of the trading world with the exception of England."

The divergence of law may be said to have culminated in what are known as the Coronation cases, to which your Lordships have referred. No doubt the occasion will arise when that chapter of English law will have to be considered

H. L. (Sc.) 1923 CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO. Lord Shaw of Dunfermline.

in this House; and in this Scottish case I do not feel it any part of my task to make a definite pronouncement upon that chapter. But I may venture by a simple illustration to make the divergence clear.

Upon the facts of this case only 20 per cent. of the purchase price was paid as part of the consideration for delivery of the engines to be supplied. But suppose the whole purchase price 11,500*l.* had been paid at the signing of the contract; then the war breaks out; and the engines are neither supplied nor even begun to be made. In that situation, as the able counsel for the respondents admitted, taking his stand on the English cases, the very same result should and would follow. The builder would retain as his own the whole price of an article which he never supplied and would never supply. Counsel were right; the "something for nothing" doctrine goes the whole length. This result under other systems of jurisprudence might be viewed as monstrous: but in England, it was contended, this is the law; and the principle is worthy of acceptance in Scotland: such is the argument.

I am not surprised that there has been in high legal quarters a feeling both of uneasiness and of disrelish as to the English rule, and that that feeling has found expression. I cite, for instance, the language of Sir Frederick Pollock in the eighth edition of his work on Contracts (p. 440), in which, summing up the English decisions, he observes: "The contract is not avoided when the failure of the condition assumed as its foundation is ascertained, but all outstanding obligations under it, and those only, are discharged; that is, payments already made cannot be recovered back, and any payment actually accrued due is still recoverable. Only the House of Lords can review these decisions, but they are not universally approved in the profession."

In *Chandler* v. *Webster* (1) Collins M.R. made a clear exposition, which may be considered rather in the nature of an explanation than a reason for the English position, in the following words: "Where, from causes outside the volition of the parties, something which was the basis of, or essential to

(1) [1904] 1 K. B. 493, 499.

the fulfilment of, the contract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply. The rule adopted by the Courts in such cases is I think to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it."

Thus the rule, admitted to be arbitrary, is adopted because of the difficulty, nay the apparent impossibility, of reaching a solution of perfection. Therefore, leave things alone: potior est conditio possidentis. That maxim works well enough among tricksters, gamblers, and thieves; let it be applied to circumstances of supervenient mishap arising from causes outside the volition of parties: under this application innocent loss may and must be endured by the one party, and unearned aggrandisement may and must be secured at his expense to the other party. That is part of the law of England. I am not able to affirm that this is any part, or ever was any part, of the law of Scotland.

No doubt the adjustment of rights after the occurrence of disturbances, interruptions, or calamities is in many cases a difficult task. But the law of Scotland does not throw up

H. L. (Sc.) 1923

CANTIARE SAN ROCCO, S.A. v. CLYDE SHIPBUILDING AND ENGINEERING CO.

Lord Shaw of Dunfermline.

its hands in despair in consequence, and leave the task alone. The maxim just quoted found no place in the law of Scotland except in quite another connection—namely, where there is a turpis causa. Under that law restitution against calamity or mischance which produces a failure of consideration is one thing that the law must and will do its best to accomplish. But restitution ob turpem causam, that the law will not make. The mischief-makers appeal in vain, the answer to them is the maxim potior est conditio possidentis.

I need not labour the distinction. It is quite clear in the Roman texts. The law of Rome knew that maxim just cited well, but it applied it not to an innocent but to a guilty case. When money had been received ob turpem causam, then the law could not be invoked to have restitution. The possessor was left with his gain and the other with his loss; in an evil cause the law could not interpose. And Stair, in a passage not often quoted (I. 7, 8), puts the matter in a nutshell: "But in things received ex turpi causa, if both parties be in culpa, potior est conditio possidentis; so there is no restitution." But restitution there ought to be here, simply and shortly because there is no turpis causa. In such a case the innocent must be restored against loss, and the unearned aggrandisement must be yielded up.

To apply these principles to the case in hand, there can be no doubt that the person who received 2310*l.* in part payment of engines which were to be built and supplied must restore the money in the event of the engines not having been supplied, and not even having been built. Both the law of Rome and the law of Scotland, not to speak of the equity of the situation, would have been clear on the subject.

I have not adverted to the puzzle that was attempted in argument as to whether the remedy of restoration sought was under the contract or not under the contract, and that for the simple reason which is thus put unanswerably by Lord Mackenzie: "The pursuers sue for repetition of the part of the price which they paid. Their case involves construction of the contract, more particularly art. 9, but it is not an

action on the contract. It is a claim for restitution; and unless the contract contains express terms to the contrary, the law of Scotland will give the remedy asked." To which I venture to add this further remark, that suppose this contract of sale referred to is entirely out of the case, there is another contract so simple and elementary as do ut des, enrolled by the civil law in its list of innominate contracts, and that would amply justify in itself, and even on the ground of contract and its recognized consequences, the restitution sought.

I agree with the judgments of the Lord Ordinary and of Lord Mackenzie. I think that this House should reverse the judgment of the First Division and restore that of Lord Hunter.

Interlocutor of the First Division reversed and interlocutor of the Lord Ordinary restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondents to pay the costs of the action in the Court of Session, and also the costs of the appeal to this House.

Lords' Journals, July 25, 1923.

Agents for the appellants: *William A. Crump & Son, for Maclay, Murray & Spens, Writers, Glasgow, and J. & J. Ross, W.S., Edinburgh.*

Agents for the respondents: *Bramall & White, for Lade & Hood, Port Glasgow, and Marton, Smart, Macdonald & Prosser, W.S., Edinburgh.*

Dictum of LORD HALDANE, at p. 267, *applied. Re* STRAKOSCH *(decd.)*. [1949] 2 All E.R. 6.

[HOUSE OF LORDS.]

H. L. (E.)* 1923 Dec. 17.

ATTORNEY-GENERAL . . . . . APPELLANT;

AND

NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND AND OTHERS . } RESPONDENTS.

Charity—"Patriotic purposes or objects"—Validity—Discretion of Trustees.

A testator by his will directed his trustees to apply one-fifth of his residuary estate "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire" as they in their absolute discretion should select:—

Held, that the words of the gift must be read disjunctively, that "patriotic purposes" were not necessarily charitable, and that the gift was void for uncertainty.

Decision of the Court of Appeal [1923] 1 Ch. 258 affirmed.

APPEAL from an order of the Court of Appeal affirming an order of Russell J. (1)

The question raised by the appeal was whether a gift in the will of H. G. Tetley deceased of one-fifth of his residuary estate in trust "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper" was a good charitable bequest.

The facts are fully stated in the report of the case before Russell J. and the Court of Appeal.

Russell J. held that the gift was void, and the Court of Appeal affirmed his decision.

Maugham K.C. and *Dighton Pollock* (*Sir Douglas Hogg A.-G.* with them) for the appellant. The words "patriotic purposes" in the collocation in which those words are used must indicate purposes which are for the benefit and advantage of the community—in other words purposes for the

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, VISCOUNT FINLAY, LORD ATKINSON, and LORD SUMNER.

(1) [1923] 1 Ch. 258.

public welfare—and if that is their true meaning this is a good charitable bequest. In *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1) Lord Macnaghten classifies the different kinds of "charity," in its legal sense, as follows: "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." This gift falls under the fourth head. It is conceded that a gift for public purposes is not a good charitable gift, because public purposes are not necessarily beneficial: *Blair* v. *Duncan* (2); so also a gift for philanthropic purposes, for there may be a philanthropic purpose which is not public; *In re Macduff* (3); so also a gift for benevolent purposes for the same reason: *Houston* v. *Burns* (4); see also *Bowman* v. *Secular Society* (5), per Lord Parker. On the other hand patriotic purposes must be charitable, because they must be for the benefit of the country as a whole. This bequest also fulfils the requirements laid down by FitzGibbon L.J. in *In re Cranston* (6), where he criticises Lord Macnaghten's definition. Further, the collocation of the words in this bequest is such that "such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects" must be read conjunctively and not disjunctively.

Courthope Wilson K.C. and *Gavin Simonds* for the respondent H. T. Tetley, one of the statutory next of kin of the testator.

Ashworth James for the remaining respondents, except P. M. Millard, another of the statutory next of kin, who did not appear.

Viscount Cave L.C. My Lords, in this case I cannot bring myself to entertain any doubt as to the correctness of the decision in the Court of Appeal.

The question raised in these proceedings is whether a

(1) [1891] A. C. 531, 583.
(2) [1902] A. C. 37, 47–8.
(3) [1896] 2 Ch. 451, 464.
(4) [1918] A. C. 337.
(5) [1917] A. C. 406, 442.
(6) [1898] 1 I. R. 431, 445–6.

H. L. (E.) 1923 A.-G. v. National Provincial Bank. Viscount Cave L.C.

certain trust declared by the testator, Mr. Henry Greenwood Tetley, of one-fifth part of his residuary estate is or is not void for uncertainty. That trust was declared in these terms: "Upon trust as to one-fifth thereof to devote and apply the same for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper."

Now the general rule is clear that if you are making a will you must declare your wishes, and not leave it in wide and uncertain terms to some one else to make a will for you. Special treatment is meted out to a gift for charitable purposes, and in that case the Courts have recognized that it is open to a testator who declares a charitable purpose to leave it to his trustees to select the particular charities for whose benefit his fund is to be applied. But that does not apply to cases not coming within the description of charity. Therefore the whole contest in this case has been to bring this trust within the description of a charitable trust.

That object has been pursued in two ways. First it is said that you ought to read the words of the trust conjunctively—that is to say, that you are to read this as a trust for purposes which are both patriotic and charitable, such purposes to be selected by the trustees. Like the learned judge of first instance, Russell J., and the learned judges in the Court of Appeal, I am totally unable to read the trust in that way. It appears to me to be plain that the testator has, as Russell J. said, given to his trustees four categories out of which they may select the objects of his benevolence; they may be either patriotic purposes, or patriotic objects, or charitable institutions or charitable objects—they may make a selection of objects from any one or more of those four categories. In short the words are to be read, not conjunctively, but disjunctively. That argument therefore cannot prevail.

Then the second point that was made is this. It is said that "patriotic purposes" are necessarily charitable purposes,

because they come within the fourth of the categories into which Lord Macnaghten in the well-known case of *Commissioners of Income Tax* v. *Pemsel* (1) divided charities. He said: "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." It is said that "patriotic purposes . . . . in the British Empire" means purposes directed to the public welfare of the British Empire, and so the trust falls within the fourth division of "trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

My Lords, it has been pointed out more than once, and particularly by the members of the Court of Appeal in *In re Macduff* (2), that Lord Macnaghten did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain charitable trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust. My Lords, I am not able to say that this is a charitable trust. The expression "patriotic purposes" is vague and uncertain. Whether a purpose is patriotic or not is a matter of opinion; it depends to a great extent upon the state of mind of the person who uses the expression. An object which appears to some persons to be patriotic may legitimately appear to others not to fall within that description; and there is no fixed rule by which a Court may determine whether a particular purpose is or is not patriotic. Further, it is not difficult to conceive purposes which to most persons would appear patriotic, but which are clearly not charitable within the legal meaning of that term. It seems to me therefore

(1) [1891] A. C. 531, 583. (2) [1896] 2 Ch. 451.

H. L. (E.) 1923 A.-G. v. National Provincial Bank. Viscount Cave L.C.

that the expression "patriotic purposes" is one which cannot be said to bring the trust within the category of a charitable trust. The point is, I think, practically covered by two well-known decisions in your Lordships' House. The first is the decision in *Blair* v. *Duncan* (1), where the words are "charitable or public purposes," and the second case is *Houston* v. *Burns* (2), where the words are "public, benevolent or charitable purposes." In both of those cases the trusts were held to be uncertain and void, and for the same reasons I hold the view that the trust in this case is also void. I move your Lordships that the appeal be dismissed.

Viscount Haldane. My Lords, I am of the same opinion. There are reasons of importance why the term "charitable" should be restrained in its meaning. In the first place, when a gift is established as being for a charitable purpose the rule against perpetuities does not apply, and therefore it would be to exempt an indefinite amount of property in the country from the operation of a salutary rule if the word "charitable" were not given a restricted meaning. But, in the second place, there is a consideration which is in one sense more important, because it applies to Scotland, where the rule against perpetuities does not apply. Your Lordships are aware that when there can be collected from a document a general intention by the person who made it to give his property for charitable purposes, although the particular charity which is named may be impossible or may have failed, the Court of administration apply the doctrine which they call the cy-près doctrine, and, recognizing that there is a general intention to set aside a class of gift as being of a charitable kind, will mould the trust defined cy-près, so as to make it come within the scope of the general intention. That I believe is the law of Scotland as well as the law of England; and it is important, because it means that in the case of this particular kind of gift—namely, a charitable gift—you can deviate from the letter of the testator's intention so long as you have kept within its spirit.

(1) [1902] A. C. 37. (2) [1918] A. C. 337.

My Lords, these two considerations make me, as I say, think that it is of great importance that we should not extend rashly the meaning of the word "charitable" in this connection. It certainly is narrower—but it is easier to say what it is not than what it is—than the word "benevolent." That was not contested at the Bar. Is it narrower than the word "patriotic"? Because, if "patriotic" is something outside charity, then I for one can find no legal ground for treating patriotic gifts as entitled to the special advantages which the law accords to charitable gifts. As has been pointed out by my noble and learned friend on the Woolsack, Lord Macnaghten's observation in the *Pemsel Case* (1), which was a mere classification of categories of charities, has been turned round. Lord Macnaghten cannot be taken to have intended to say that anything which belonged to the more general or public character of the fourth class enumerated could be the subject of a good gift if it did not in some sense come within the general category of charity.

Now, my Lords, "patriotic"! Lord Robertson in his judgment in *Blair* v. *Duncan* (2) pointed out instances of gifts which undoubtedly were patriotic, but were not in his opinion charitable, and the reasons which Lord Robertson, who was very exact in his use of language, gave there seem to me to be of importance. What "charitable" is I should be sorry to have to define with precision without hearing an elaborate argument, but what does not come under "charitable" I think is usually fairly plain. Between a patriotic intention and a charitable intention there is a distinction not only in language but in substance. In the case of a gift for charitable purposes there is a desire to profit people who would not be profited without your gift—that is the dominant motive. In the case of patriotism there is a desire to fulfil one dominant purpose, that is to benefit the cause of the country to which you belong. My Lords, those are two different heads of intention, different perhaps not in such a way that they never overlap, but in such fashion as to

(1) [1891] A. C. 531, 583. (2) [1902] A. C. 37.

H. L. (E.) 1923 A.-G. v. NATIONAL PROVINCIAL BANK. Viscount Haldane.

distinguish the one class from the other. Now here these considerations, in my opinion, dispose of this appeal, because the gift is "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper." These two alternatives are disjoined, they are real alternatives, and if they exclude each other, even to any extent, then the gift must fail; because a man cannot disinherit his heirs by giving away his property unless he really gives it away; he cannot leave it to some one else to make a will for him, nor can he leave it to his trustees to give it for purposes which are to be completely in their discretion, unless these purposes are so indicated as in some sense to confer on a class of beneficiary an interest. In this case the testator might have done that. If he had confined himself to charities there would have been a general indication of a class for the benefit of which the Court would administer, even if only cy-près; but, if the trustees have an alternative in their complete discretion, which is, to take a property which is not vested in them beneficially, nor vested in any charitable class exclusively, but given to the trustees with a discretion to hand it over to some not prescribed patriotic object, then you have not got that divesting out of the testator of his interest which is essential to constitute a testamentary disposition. The testamentary disposition in this case therefore fails because of uncertainty.

My Lords, I find myself at one with the judgment of the Court below, and I concur in the motion that this appeal should be dismissed.

VISCOUNT FINLAY. My Lords, I am of the same opinion. It appears to me quite clear that because an object is patriotic it is not necessarily charitable. It certainly is not so in the popular sense in which language of that kind is used, and I think it is equally clear that it is not so in the legal sense in which the word "charitable" is used.

In the case of this particular will it is perfectly clear that

the two terms are used as not meaning the same thing, because the words are, "to devote and apply the same for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper." The very wording of that clause shows that patriotic purposes were not necessarily in the eye of the testator charitable purposes. The word "patriotic" is too vague. For reasons which have a root in the history of the English law special immunities are extended to charitable gifts which do not apply to gifts of other kinds, and I do not think it can be properly contended that gifts for a patriotic purpose are intended to share in these immunities.

LORD ATKINSON. My Lords, I concur.

LORD SUMNER. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed. By consent, the costs of the appellant and respondents, the National Provincial and Union Bank of England, Ld., to be paid out of the capital of one-fifth of the testator's residuary estate, the subject of the appeal, as between solicitor and client.

Lords' Journals, Dec. 17, 1923.

Solicitor for the appellant: *Treasury Solicitor.*

Solicitors for the respondents P. M. Millard and H. T. Tetley: *Patersons, Snow & Co.*

Solicitors for the remaining respondents: *Pearce & Sons.*

[HOUSE OF LORDS.]

H. L. (E.)* 1923 Dec. 17.

BAKER AND ANOTHER . . . . . APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE RESPONDENTS.

Revenue—Stamp Duty—"Conveyance or transfer operating as a voluntary disposition inter vivos"—Resettlement of real Estates—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 74, *sub-ss.* 1, 5.

By the Finance (1909-10) Act, 1910, s. 74, sub-s. 1: "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale. . . . ."

By sub-s. 5: "Any conveyance or transfer (not being a disposition in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

The life interest of Sir E. in certain settled estates having been mortgaged by him and the mortgagees having foreclosed, an arrangement was proposed for the repurchase of Sir E.'s life interest by means of moneys to be raised out of the fee of the settled estates. His eldest son F., the tenant in tail in remainder, being then a minor, an application was made to the Court for the approval of a scheme for carrying out the arrangement and the resettlement of the estates. On coming of age F., with the consent of Sir E. as protector of the settlement, executed a disentailing deed, and thereafter the indenture of resettlement was executed, under which F. received an allowance during the joint lives of Sir E. and himself, a right to 5000*l.* if he married, and a power to jointure:—

Held, that s. 74 applied to a settlement of real estate, and that, though there was some valuable consideration for the deed of resettlement, such consideration could not, having regard to the terms of the latter part of sub-s. 5 of s. 74, and to the opinion of the Commissioners, with which the House agreed, that the deed of resettlement conferred a substantial benefit upon the persons to whom the settled property was transferred, be deemed to be a valuable consideration within the exception contained in the former part of the sub-section.

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, VISCOUNT FINLAY, and LORD SUMNER.

Held, therefore, that the deed of resettlement was liable to stamp duty under sub-s. 1 of the section.

Decision of the Court of Appeal [1923] 1 K. B. 323 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Sankey J. upon a case stated by the respondents, the Inland Revenue Commissioners, pursuant to s. 13 of the Stamp Act, 1891, for the opinion of the Court on the assessment of stamp duty upon an indenture of resettlement dated August 26, 1915. (2)

The question at issue was whether or not the respondents were right in assessing the resettlement of 1915 with ad valorem duty at 689*l.* as being an instrument liable to ad valorem stamp duty as a conveyance or transfer operating as a voluntary disposition inter vivos within the meaning of s. 74 of the Finance (1909–10) Act, 1910.

Sankey J. held that the instrument was not liable to ad valorem duty, but his decision was reversed by the Court of Appeal (Lord Sterndale M.R., Warrington and Younger L.JJ.).

The facts are stated in the report before the Court of Appeal and are summarized in the headnote; and they sufficiently appear from the judgment of Viscount Cave L.C.

1923. Dec. 14, 17. *Jenkins K.C.* and *Harman* for the appellants, the trustees of the resettlement. Sect. 74 of the Finance (1909–10) Act, 1910, does not apply to a resettlement such as this. This resettlement was not a disposition inter vivos within the meaning of s. 74. Even if it was, it was a disposition made in good faith and for valuable consideration and was not a voluntary disposition. The consideration for the resettlement cannot be measured in terms of money and is imponderable, and sub-s. 5 of s. 74 does not apply. There can be no question as to the "inadequacy of the sum paid as consideration," for no sum was paid as consideration and there were no "other circumstances" within the latter part of sub-s. 5 to justify the Commissioners in forming the opinion that the resettlement conferred a

(1) [1923] 1 K. B. 323. (2) [1922] 2 K. B. 786.

H. L. (E.) 1923 BAKER v. INLAND REVENUE COMMISSIONERS.

substantial benefit on any person to whom the property was conveyed or transferred. In any case their opinion is not conclusive and does not oust the jurisdiction of the Court. If the matter is at large there are here no circumstances to enable the Court to say that there was not full consideration as between father and son.

Sir Thomas Inskip S.-G. (with him *Sir Leslie Scott K.C.* and *Gavin Simonds*) for the respondents was called on only upon a subsidiary question—namely, whether the amount fixed by the Commissioners as the value of the property conveyed, for the purpose of arriving at the ad valorem duty, was correct, and he agreed, in this particular case, to make the deduction mentioned in the judgment of the Lord Chancellor and to reduce the amount of the duty accordingly.

VISCOUNT CAVE L.C. My Lords, the question raised in this appeal is whether a certain resettlement of family estates should or should not be stamped with ad valorem duty under s. 74 of the Finance (1909–10) Act, 1910.

The resettlement in question came about in this way: Before and in the year 1913 certain estates stood settled to the use of Sir Everard Cayley for life with remainder to his eldest son Mr. Francis Cayley (then an infant under the age of twenty-one years) as tenant in tail male, with a number of remainders over in favour of members of the family. Sir Everard's life estate had some years before been mortgaged with some policies on his life to the Legal and General Assurance Society, and that mortgage had been foreclosed, so that both the life estate and the policies were the property of the assurance society, and there was in substance no income from the estates coming to the Cayley family. In that condition of affairs it was not unnatural that the parties should cast about for a means of producing a better state of things. They applied to the Court of Chancery, which sanctioned a scheme such as some of your Lordships are familiar with, under which there was raised out of the settled property (including capital moneys held on the terms of the Settled Land Acts) a sum of about 77,000*l.* to be applied in the purchase from the

Legal and General Assurance Society of the life estate and the policies. It was at the same time provided that while Mr. Francis Cayley was at the university an allowance should be made to him, and that the net balance of income during his minority should be paid to his mother Lady Mary Cayley for the maintenance of herself, her husband and children. It was also provided in the order sanctioning the scheme that when Mr. Francis Cayley attained twenty and a half years of age an application should be made to the Court with a view to the resettlement of the estates. That scheme went through and the purchase was carried out. Before Mr. Francis Cayley attained the age of twenty-one application was made to the Court, and on the day when he attained the age of twenty-one years—I think it was February 4, 1915—an order was made by the Court approving a proposed resettlement of the Cayley estates. That order recited that Mr. Francis Cayley was himself desirous of making the resettlement. The resettlement was accordingly made, and was dated August 29, 1915. By that resettlement the life estate of Sir Everard Cayley was first dealt with, and it was provided that out of that life estate certain allowances should be made to Mr. Francis Cayley, commencing at 250*l.* a year and increasing first on his attaining the age of twenty-five to 300*l.*, and then on his marriage to 500*l.* a year, and the balance of the income during Sir Everard's life, after keeping down the interest, premiums and other payments, was to go to Lady Mary Cayley, to put it generally, for the benefit of the family. That disposed of the life estate. I should have said that before the resettlement was executed there was a disentailing assurance, by which Mr. Francis Cayley, as tenant in tail male, with the consent of his father as protector, disentailed the estates and vested the remainder in himself in fee simple, and that disentailing assurance contained a covenant by Mr. Francis Cayley to resettle the estates in the manner approved by the Court. I now come back to the resettlement. By the second testatum in the resettlement Mr. Francis Cayley conveyed his remainder, which had then become a remainder in fee simple, to the ordinary uses in strict settlement—

H. L. (E.) 1923 BAKER v. INLAND REVENUE COMMISSIONERS. Viscount Cave L.C.

that is to say, he reserved to himself the first life estate in remainder and, after his death, the estates were settled to the use of his sons successively in tail male, and then to other members of the family; there was the usual series of remainders in favour of different branches of the Cayley family, and there were the usual powers to jointure widows and to give portions to younger children.

Now that is the resettlement in respect of which the question arises whether or not it falls within s. 74 of the Act of 1910. Sect. 74, sub-s. 1, provides: "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale." That means, having regard to other provisions in the Finance Acts, that a duty of 1 per cent. upon the value of the property conveyed is to be imposed on a conveyance or transfer of the character described in the section. I pass over the second, third and fourth sub-sections of s. 74, and I go to sub-s. 5, which gives what may be called a definition of the expression "conveyance or transfer operating as a voluntary disposition inter vivos." That sub-s. (5.) provides: "Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos." Stopping there for the moment, the effect of the sub-section so far is that any conveyance or transfer not being (to put it shortly) a disposition for value is to fall within s. 74, sub-s. 1. I do not feel any doubt that the words "conveyance or transfer" there include a settlement of real estate, partly because by the Stamp Act, 1891, which is to be read with this statute, it is provided (in s. 62) that "every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged

with duty as a conveyance or transfer of property," and partly because I find both in sub-s. 4 of this s. 74, and in sub-s. 5 of the same section, expressions which show plainly that the expression "conveyance or transfer" prima facie includes a settlement. Therefore I think it clear that, so far, a deed of this character falls within the section, but subject to this observation that, if the deed is executed for valuable consideration, that brings it within the exception and so takes it out of the clause. Well, there was some valuable consideration for this settlement. I do not myself hold—and here I am agreeing with what the Commissioners of Inland Revenue have found in the case—that the consent of the protector is valuable consideration within those words. That consent was a necessary condition to the execution of the disentailing assurance, but it was not valuable consideration given to Mr. Francis Cayley. But he did take valuable consideration, because, as one of the terms of executing the resettlement, he got an allowance for himself during his life commencing at 250*l.* a year and increasing to 500*l.*, he also got a power to jointure his widow even during his father's lifetime, and he got a power to appoint portions to his younger children. Therefore he did receive some consideration for his action in resettling the estates. Now I have to pass on to the second part of sub-s. 5, which has a bearing upon that state of things. The sub-section proceeds: "and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred." I think that means that a conveyance, although for value, comes within the section if it confers upon the grantee a substantial benefit beyond what that grantee gives, or (in other words) if it is in substance a gift to the person taking under it after allowing for any consideration which he brings in. In such cases the conveyance does confer a benefit—that is a gift—on the person to

H. L. (E.) 1923

BAKER v. INLAND REVENUE COMMISSIONERS.

Viscount Cave L.C.

whom the conveyance is made, and to that extent is to be treated as a voluntary disposition.

In this case the Commissioners have in their case said that this conveyance falls within the description in the latter part of sub-s. 5. They have said it in rather a strange way, because they have found that "if it was competent to them to be of that opinion" —which means, I think, the following opinion—"they were of opinion by reason of the inadequacy of the sum paid as consideration and other circumstances that the conveyance conferred a substantial benefit on the persons to whom the property was conveyed." I think it is unfortunate that they refer there to the inadequacy of the sum paid, because there was no sum paid; but I read that as a finding that by reason of the circumstances of the case the conveyance did confer a substantial benefit on the persons to whom the property was conveyed—that is to say, upon the persons who took estates under the settlement. Therefore they have, in effect, given the opinion which is required of them by sub-s. 5 in order to bring the case within the section. It is suggested that that opinion is subject to appeal. It is needless to deal with that point on principle, because the Commissioners have expressly referred the question to the Court by providing in the case that "if the Court on the affidavits and orders is of opinion that there was ground for the Commissioners coming to this conclusion the assessment is to be maintained." Therefore their finding is in this case expressly left open to consideration by the Court, and on considering it I feel bound to say that I agree with the finding. It is obvious to any one that, having regard to the value of the estates which Mr. Francis Cayley settled upon his descendants and the other members of his family, and the trifling nature of the allowance which he obtained in return, the conveyance did confer a very substantial benefit upon the persons who took under the uses limited by the resettlement. Therefore if I have to consider the question which the Commissioners considered, I come to the conclusion to which they came.

The result is that, in my opinion, the Commissioners were

right in holding that this resettlement came within the ambit of s. 74 of the Act of 1910 and ought to be stamped with ad valorem duty, and, accordingly, that the order of the Court of Appeal should be affirmed.

There is one question of detail which I have to mention. Under s. 74, sub-s. 1, the stamp is to be calculated upon the value of the property conveyed or transferred. Now we have had no argument as to whether the amount fixed by the Commissioners as the value of the property conveyed is correct or not, but we have been informed by the learned Solicitor-General that the amount was fixed by reference to the value of the estates in possession after deducting all incumbrances and deducting the value of the life estate of Sir Everard Cayley. So far I think that is right, but a doubt occurred to your Lordships whether there should not also have been deducted the value of the life estate in remainder which Mr. Francis Cayley reserved to himself by the terms of the resettlement. It is not necessary for your Lordships to determine that point, because the Solicitor-General has agreed that, without conceding the general principle (which may have to be argued in another case), he is willing in this case to make that deduction, and to reduce the amount of the assessment accordingly. Your Lordships are, I understand, prepared to accept that suggestion, which is also satisfactory to the appellants; and, subject to that modification, I move your Lordships that the judgment be affirmed and the appeal dismissed with costs.

VISCOUNT HALDANE. My Lords, I entirely agree, and but for a certain obscurity attending the course of the legislation with regard to the stamp in this case I should not have thought it necessary to add anything.

My Lords, the Stamp Act of 1891 imposes duties which are set out in its Schedule upon various kinds of transfers. There were transfers on sale, and these were stamped ad valorem. Then there were settlements; and the definition of "settlement" is a somewhat limited one and may not extend to everything which in popular terms could be called

H. L. (E.) 1923

BAKER v. INLAND REVENUE COMMISSIONERS.

Viscount Haldane.

a settlement, but there is inserted a section in the Schedule which provides that a conveyance or transfer of any kind which has not been described under the head of a conveyance or transfer on sale is to bear a stamp, but only a 10*s.* stamp. When the very revolutionary Finance Act of 1910 was passed a section was introduced providing that any conveyance or transfer operating as a voluntary disposition inter vivos was to be chargeable as if it were a transfer on sale. That was the first sub-head of s. 74; but then s. 74 contained a further head, number 5, which was introduced to prevent certain questions which it was conceived might arise by referring back to the Stamp Act of 1891. It was enacted that any conveyance or transfer which was not a disposition made in favour of a purchaser or incumbrancer should be deemed to be a conveyance or transfer operating as a voluntary disposition. So far that brings it at once under the new legislation contained in sub-s. 1. Then it goes on: "and" —except in the case of marriage—"the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration,"—which might take it out of the category of being a voluntary disposition inter vivos and make it a conveyance under a bargain—"where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred." Now, that being so, if the Commissioners are of opinion—and that opinion is accepted—that a substantial benefit is conferred by the settlement under consideration, then that gets rid of all questions which might arise under the earlier part of the legislation. My Lords, I think that in this case the conveyance was one where, by reason of the inadequacy of the consideration and also because the whole transaction, from its beginning and in its substance, was a provision made by the son for the family much more than for himself, the conveyance conferred a substantial benefit on those in whose favour the property was conveyed.

My Lords, whether or not it be possible legally to separate what was done by the Order of 1913 from the subsequent transactions of 1915, I do not think that the subsequent transactions can be adequately interpreted without reference to what was done in 1913. In 1913 it was evident that an old family had got, by reason of the difficulties of the father, the tenant for life of extensive settled estates, into a position of much financial complication, and a scheme was devised for getting rid of this. The father's life estate had passed into the hands of mortgagees, and the proposal was to raise out of the fee of the estate, which, as the estate was then situated, was a fee tail in Francis, the eldest son, such moneys as might enable the life interest to be bought back and dealt with, and the estate to be recouped by the purchase of certain policies on which, of course, premiums would have to be kept up out of the estate, but which ultimately would recoup what had been raised by mortgage in order to effect the transactions required if the family position was to be in some measure restored. Accordingly, a scheme for this purpose, or, rather, the first part of the scheme, was approved in chambers by a judge in the Chancery Division. The rest of the scheme could not be carried out until the eldest son had attained twenty-one, and was in a position to execute the necessary conveyances. When that time came the father who, although he had parted with his life estate, was still protector of the settlement, was willing to concur, and he agreed to concur with the son in disentailing, and the terms of the transaction were that there should be a resettlement. My Lords, I have often wondered how the Chancery Division, or the old Court of Chancery, got a jurisdiction as extensive as it has assumed in dealing with the property of infants. It is quite true that that Court has always had a certain power of controlling the administration of the infant's property in his own interest; that is one thing. It is quite another thing to cut up that property and take some of it away. But undoubtedly that has been done over and over again, and it is probably too late to-day to question the exercise of a power exercised in this very far-reaching fashion. To

H. L. (E.) 1923

BAKER v. INLAND REVENUE COMMISSIONERS.

Viscount Haldane.

interpose the interference of the Court to sanction an arrangement under which an infant eldest son, tenant in tail in remainder, is to concur in a resettlement of property is quite natural; I am not saying a word in criticism of that. By a tradition which has long obtained in this country—and which is probably somewhat less important to-day than it was a generation or, still more, two generations ago—it was a general custom, as soon as an eldest son came of age, that he, being tenant in tail, should concur with his father in a resettlement under which he in his turn became the tenant for life with remainder to his eldest son, and there were the usual provisions for portions, possibly only in substance keeping alive those which already existed, or possibly adding to them. That was done because in contemplation of society, and therefore in contemplation of the Courts, it was considered to be an advantageous thing to carry on a family and perpetuate the position of the eldest son as the owner of a great estate in the mode which was current in the country to which he belonged, and accordingly it was treated as a proper thing to sanction in the interest of the eldest son. But when the process of resettlement was extended further, and extended to taking a great interest out of the estate of an infant tenant in tail in remainder, then it became another matter, and it is there that my expression—not so much of doubt as of wonder—at the extent to which the Court of Chancery has carried its jurisdiction in practice arises.

In this case, my Lords, the son, Francis, behaved in a highly honourable manner. His father, his mother, his brothers and sisters were in great straits, and he appears to have been very willing to help them, even at a sacrifice to himself. Accordingly, he concurred in a resettlement—which doubtless carried out what had been contemplated from the beginning of the negotiations prior to 1913, when the first order in chambers was made—which did a number of things. First of all, his father's life interest was repurchased at the expense of the fee. Then it was settled so as to make a provision—and not a very large one—for himself, and also a provision

for his mother, which would enable the family to be kept free from great straits. Then, after that, he cut down his estate tail to an estate for life, but not before he had made other substantial provisions for his mother and for the other children of the family, and had left himself in a position by no means so good from the point of view of money as was the case before this resettlement was entered on. My Lords, under these circumstances I think that the conveyance when looked at becomes one where, by reason of the inadequacy of the consideration and also because the whole transaction from the beginning and in its substance was a provision made by the son for the family much more than for himself, the conveyance conferred a substantial benefit on those in whose favour the property was conveyed. If that be so, then the case comes exactly within sub-s. 5 of s. 74 of the Finance Act, 1910.

My Lords, the Commissioners to whom, under the somewhat ambiguously worded provision in that section, it is referred to determine what the character of the consideration is, and whether there is an excess, have given an opinion. It is not necessary here to decide the extent to which that opinion might be reviewed. It may be that it was thought that the matter was too intricate for a Court of law to go into without inquiry, and that the Commissioners themselves were the best and proper persons to inquire. It may well be that we have power, sitting as judges, to scan any error which we may deem to exist in point of law or in point of principle in the mode in which the Commissioners have approached the subject. It is not necessary to give any decision upon that question in this case, for the Commissioners are willing to deal with the assessment, and those who represent them have listened to what your Lordships have had to say upon the subject.

My Lords, for these reasons I concur in the motion which has been proposed from the Woolsack.

VISCOUNT FINLAY. My Lords, I am of the same opinion, and have very little to add to what has been said.

H. L. (E.) 1923

BAKER v. INLAND REVENUE COMMISSIONERS.

Viscount Finlay.

The Act of 1910, by the seventy-fourth section, made a considerable change by providing in the first sub-section that any conveyance operating as a voluntary disposition inter vivos should be chargeable with the like stamp duty as if it were a conveyance on sale, substituting, of course, the value of the property for the amount of the consideration for the sale. That is the first provision in this rather long seventy-fourth section, which has been considered in the present case.

The other part of that clause which requires consideration is the fifth sub-section, and that, for present purposes, I think, may be divided into two parts. The first consists of the opening words, "Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos." That is a general provision from which are excepted dispositions made in good faith and for valuable consideration. The first question that came before the Commissioners was whether the conveyance by Francis Cayley in the present case fell within that exception of conveyances for valuable consideration and in good faith. The Commissioners thought that it was not a conveyance in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration, giving as their reason that the conveyance disposed of the property conveyed in accordance with his own wishes and not in accordance with any directions given to him by any person giving him value for the right to so direct. I am not able, upon the materials before me, to agree with that conclusion. For the reasons which the Lord Chancellor has given I think that the conveyance was one for valuable consideration and, of course, it was in good faith. That disposes, so far as the present case is concerned, of the first part of sub-s. 5, but the real pinch of the case arises in the following words in the second portion of the sub-section, which begins by saying it is to be deemed to be a conveyance or transfer operating as a voluntary

disposition inter vivos, and then goes on: "and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred." The first observation I wish to make is this: The exception of the case where marriage is the consideration to my mind indicates very clearly that it was not intended to except settlements from the operation of this clause. We were pressed with an argument upon that point, but it seems impossible to suppose that where the thing took the shape of a settlement the clause was not to operate if the conditions were satisfied: and the fact that marriage is mentioned as an excepted case shows that settlements must have been in consideration. But then the clause goes on to confer a certain power upon the Commissioners with regard to the adequacy of the consideration. I confess that I have very considerable doubt as to whether the full extent of those words as they appear in the section was appreciated at the time it was passed into law. As soon as you have a provision that voluntary conveyances shall be subject to the same duty as if they were on sale, the question of course arises, What will happen supposing a sum is mentioned as a consideration, but that is an inadequate sum? It is perfectly clear that if no provision were made to meet that case there might be wholesale evasion of the provision—some sum which was not a mere nominal sum, but was a wholly inadequate consideration, might have been inserted, and, unless that case had been dealt with, the provisions of the Act might have been altogether nugatory—and you have the latter part of the fifth sub-section for that purpose. Many people might have been disposed at first sight to read this provision as merely intended to prevent such inadequate consideration being put in for the purpose of avoiding the Act. Some power in the Commissioners to deal with such cases was obviously necessary. I very much doubt

H. L. (E.) 1923

BAKER v. INLAND REVENUE COMMISSIONERS.

Viscount Finlay.

whether it was intended to give a power to weigh the benefits obtained under the ordinary case of resettlement, on the eldest son coming of age, or any family circumstances occurring which make a resettlement desirable; but what we have to deal with is the words used, and I think it is impossible to escape from the wide words there employed. The Commissioners have devolved upon them the duty of forming an opinion whether "by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred." I concur in what the Lord Chancellor has said as to the form in which the opinion of the Commissioners on this point is expressed. The circumstances which they had in their minds are not stated; that is, they merely copied the words of the Act, changing the word "or" into "and." The Act provides for the case of inadequacy of the sum paid as consideration, or other circumstances, and the finding of the Commissioners is that they were of opinion that "by reason of the sum paid as consideration *and* other circumstances" the conveyance conferred a substantial benefit on the person to whom the property was conveyed. I think it would have been more satisfactory if the circumstances they relied on had been stated. I have no doubt they had in their minds the fact that Francis made a very considerable sacrifice in this arrangement, which was carried out for the benefit of the family. Whether it is intended or not, I think that the Commissioners undoubtedly have the power, if it be their opinion that a substantial benefit is conferred upon the persons to whom the property is conveyed, of passing in review, so to speak, the terms of such a resettlement, and seeing how far it conferred substantial benefit on certain persons. That being so, I think it is impossible to say that the section did not give power to the Commissioners to do what they did. I confess that it is with considerable reluctance I have arrived at this conclusion, but I do not think on the whole, after consideration, that there is any escape from the words of the sub-section.

LORD SUMNER. My Lords, I concur. The question is a very narrow one, and the construction of this section, which is plain, is also very decisive, and there is nothing to be added.

Counsel for the respondents having stated that the Commissioners of Inland Revenue did not object, in this particular case, to a reduction of the ad valorem stamp duty payable upon the instrument of August 26, 1915, *from the sum of six hundred and eighty-nine pounds to the sum of two hundred and fifty-four pounds, ten shillings, and consented to repay to the appellants the difference between the said two sums; and due consideration had of what was offered on either side in this cause: Order of the Court of Appeal affirmed subject to the modification hereinbefore mentioned, and appeal dismissed with costs.*

Lords' Journals, Dec. 17, 1923.

Solicitors for the appellants: *Gibson & Weldon, for Tasker, Hart & Munby, Scarborough.*

Solicitor for the respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1923 Dec. 18.

UNITED STATES OF AMERICA (REPRESENTED BY THE UNITED STATES SHIPPING BOARD) . . . . . APPELLANTS;

AND

LAIRD LINE, LIMITED . . . . . RESPONDENTS.

Shipping—Collision—Fog—Excessive Speed—Failure to whistle—Contributory Negligence—Wrong Manœuvre immediately replaced by right Manœuvre—Imminence of collision.

The steamship *R.*, going from Greenock to Dublin, was steering a course S.W. by S. ½ S., and was travelling at a speed of 13 knots. On entering an area of dense fog she maintained her speed and did not blow her whistle. The steamship *W.*, bound from America for Glasgow, was steering N., and was proceeding at a rate of 3½ knots and was sounding her fog siren. Suddenly the master of the *W.* became aware of a white light, which turned out to be the masthead light of the *R.*, half a point on the starboard bow and about 1200 feet away, and he thereupon gave the order hard-a-starboard, but immediately afterwards, on seeing the red light of the *R.*, he gave the order hard-a-port and stop and reverse engines. The original order did not affect the course of the ship, and the interval of time between the two orders was calculated at three seconds. The *W.* struck the *R.* forty seconds later on her port-side near the stern. The *R.*, on sighting the *W.*, hard-a-ported until the moment of collision, when the order hard-a-starboard was given to throw off the stern and minimise the blow. It was conceded that the *R.* was partly to blame for the collision in navigating at excessive speed:—

Held, that the proper order for the master of the *W.* to have given on first sighting the *R.* was to stop and reverse; but that the master, having been put in a position of extreme peril by the improper navigation of the *R.*, was entitled to a short interval for his mind to grasp the situation and that, in the circumstances, the first order was superseded by the second with sufficient promptitude to exclude the idea of negligence.

Held, therefore, that the *R.* was alone to blame for the collision.

The Bywell Castle (1879) 4 P. D. 219 applied.

Decision of the First Division of the Court of Session in Scotland 1923 S. C. 316, reversed and decision of the Lord Ordinary restored.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland (1) in conjoined actions recalling the interlocutor of the Lord Ordinary.

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, and LORD BLANESBURGH.

(1) 1923 S. C. 316.

The litigation arose out of a collision between the appellants' steamship *West Camak* and the respondents' steamship *Rowan*, which occurred on the night of October 8, 1921, in a dense fog off the coast of Wigtownshire.

The Lord Ordinary (Lord Anderson) found that the *Rowan* was alone to blame for the collision.

The First Division (the Lord President, Lord Skerrington and Lord Cullen) found that both ships were to blame and apportioned the liability for the loss as follows, the respondents (the owners of the *Rowan*) two-thirds and the appellants (the owners of the *West Camak*) one-third.

The appellants claimed that the interlocutor of the Lord Ordinary should be restored.

The facts are summarized in the headnote and are fully stated in the judgment of Lord Dunedin.

The appeal was heard with nautical assessors.

1923. Nov. 27, 29. *Butler Aspinall K.C.* (of the English Bar) and *Carmont* (of the Scottish Bar) for the appellants. In the agony of collision brought about by the improper navigation of the *Rowan* the master of the *West Camak* was not guilty of negligence in delaying for three seconds to order the correct manœuvres to avoid the collision. In the circumstances he was entitled to a short interval within which to make up his mind: *The Emmy Haase* (1); *The Kirby Hall* (2); *The Bywell Castle* (3); *The Vindomora.* (4) Therefore the *Rowan* was alone to blame for the collision.

Condie Sandeman (*D. F.*), *Bateson K.C.* (of the English Bar) and *Normand* (of the Scottish Bar) for the respondents. When the master of the *West Camak* saw the white light and nothing more the right thing for him to do was to stop his vessel and reverse his engines, and the wrong thing which he did resulted in a waste of precious time. If the *Rowan* had had a second or two more the evidence shows that she would have escaped collision. The appellants at the hearing did not set up the case that the master of the *West Camak* found

(1) (1884) 9 P. D. 81.
(2) (1883) 8 P. D. 71.
(3) 4 P. D. 219.
(4) [1891] A. C. 1.

H. L. (Sc.) 1923 U. S. Shipping Board v. Laird Line, Ld.

himself confronted with such imminent peril that ordinary presence of mind and ordinary skill could not have enabled him to take at once the proper decision to reverse his engines. In any event, while a sudden and imminent peril might excuse hesitancy, indecision or omission to act promptly, it could not be held to excuse a manœuvre on the part of the master so obviously wrong as starboarding to the light of another steamship the course of which was unknown to him. The duty of the master was not to take time to think but to stop at once.

Butler Aspinall K.C. replied.

The House took time for consideration.

1923. Dec. 18. Lord Dunedin. My Lords, shortly after midnight on October 8, 1921, a collision occurred on the coast of Wigtownshire, not far from Corsewall, between the screw steamer *Rowan*, the property of the respondents, and the screw steamer *West Camak*, the property of the appellants.

The *Rowan* was bound, carrying the mails, from Glasgow and Greenock to Dublin, and was, at the time of collision, steering a course S.W. by S. ½ S. The *West Camak*, which had come from America, was bound for Glasgow and, at the time of collision, was steering N. There was a dense fog at the time. The *West Camak* had previously to the collision been enveloped in fog for some time; the *Rowan* had only recently arrived in the fog area. At the time of the collision the *Rowan* was going at full speed, which was 13 knots. The *West Camak* was going very slow, at from 3 to 4 knots. The *Rowan* was sounding no signal, the *West Camak* was sounding her fog siren. Cross-actions were raised by the owners of the two ships and were conjoined.

Lord Anderson, before whom the actions depended, after proof led, found that the *Rowan* was solely to blame for the collision. On a reclaiming note the First Division recalled that interlocutor and found both vessels to blame, but apportioned the loss two-thirds to the *Rowan* and one-third to the *West Camak*. Appeal has now been taken by the owners of the *West Camak* to your Lordships' House.

My Lords, for a vessel to proceed in fog at full speed without sounding her whistle or siren was clearly wrong, and the respondents have not sought before your Lordships to excuse themselves. The only point debated is whether the *West Camak* was also to blame. In the matter of speed and of sounding her signals there was no cause for blame. The whole point depends on the manœuvre immediately before the collision. Now the account of the incidents leading up to the collision as given by those on board the *West Camak* is clear, and no question has been raised as to credibility. The Lord Ordinary believed the witnesses, and the learned judges of the Inner House are content with the story as told by them. It is as follows :—

The master of the *West Camak* was on the bridge. The ship was proceeding, as already mentioned, cautiously on a north course, when suddenly the lookout sounded three bells, indicating something ahead, and at the same time the master became aware of a white light half a point on the starboard bow. This was, as it turned out, the masthead light of the *Rowan*. He estimated it at about 1200 feet away. The moment he saw it he gave the order "Hard-a-starboard." Almost immediately thereafter, the period elapsed being calculated at about three seconds, he saw a red light and he then instantaneously ordered "Hard-a-port and stop and reverse engines." It is satisfactorily proved that the second order superseded the first at so short an interval that no alteration in the direction of the vessel was effected by the starboard helm. It is also admitted by all that the order given upon the appearance of the red light was the proper order. The account given by those on board the *Rowan* was that the *West Camak* only appeared when a collision was obviously imminent; that upon the appearance of the *West Camak* the order was given to put the helm hard-a-port until immediately before the collision, when the order was to put the helm hard-a-starboard in order to throw off her stern and minimise the blow. The engines were maintained at full speed. The manœuvre of the *Rowan*, so far as manœuvre is concerned, is agreed to have been in the circumstances right.

H. L. (Sc.) 1923 U. S. Shipping Board v. Laird Line, Ld. Lord Dunedin.

None the less the collision occurred some forty seconds after the *West Camak* had seen the white light. The *West Camak's* bow struck the port side of the stern of the *Rowan* some 15 or 20 feet from the end of the vessel. It is contended by the respondents that the proper order for the *West Camak* to have given, the moment the white light was seen, was the order subsequently given—namely, "helm hard-a-port and engines reversed"—and that the erroneous order of "helm hard-a-starboard," with no order to the engines, was a material contributing cause to the collision. Now so far as the helm is concerned, inasmuch as the "hard-a-starboard" order was countermanded before it had any effect on the vessel, that order may be disregarded. The point is, therefore, reduced to the simple question: Was the delay of three seconds from the time the white light was seen till the appearance of the red light in ordering the engines to be reversed such negligence on the part of the master as to infer liability on the part of the ship?

My Lords, I do not doubt that when a vessel is proceeding in fog and sees a white light ahead the proper order, however slow the vessel is going, is to stop and reverse. But it has been laid down again and again that when a situation suddenly occurs which demands a manœuvre, the person in charge of the ship at the moment cannot be condemned if he does not act quite instantaneously. He is entitled to an interval, however short, and it must be short, for his mind to grasp the situation and to express itself in an order. This was laid down in clear terms by Butt J. in *The Emmy Haase* (1), and the same was repeated in the Judicial Committee in the case of *S.S. Kwang Tung* v. *S.S. Ngapoota*. (2)

I am of opinion that in this case the interval of three seconds was not excessive, and that the right order was given with promptitude sufficient to exclude the idea of negligence in not having given it sooner. The respondents argue from the event that the ship was struck so very near the stern that three seconds would have made all the difference. That might have been so, though it would be difficult to affirm

(1) 9 P. D. 81. (2) [1897] A. C. 391, 393.

categorically that it would, but the only reason why this very short time would have made all the difference is to be found in the excessive speed of the *Rowan* itself. Accordingly, the *Rowan* is hit by a consideration analogous to that which prevailed in the well-known case of *The Bywell Castle* (1) and many others—namely, that it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger. I am therefore of opinion that the judgment of the Lord Ordinary was right and should be restored. The respondents must pay the costs of the appeal.

Lord Atkinson. My Lords, I concur, and have nothing to add.

Lord Shaw of Dunfermline (read by Lord Phillimore). My Lords, I entirely agree with the judgment pronounced by my noble and learned friend on the Woolsack.

The *Rowan* was to blame, grossly to blame, navigating as she was at full speed through a dense fog. That is admitted. The master of the *West Camak*, suddenly discerning a white light slightly on his port bow and only 1200 feet away, in the agitation of the moment gave the order to starboard the helm and within three seconds gave the order, "Hard-a-port and stop and reverse engines." The first order was erroneous, but it is proved beyond doubt that it did not deflect the course of the vessel, the second order having followed within three seconds.

The case is accordingly one in which no act of bad seamanship on the part of the master of the *West Camak* brought the vessels together. With regard to the second and the correct order, the House has to judge not so much a question of seamanship as a question of psychology. The issue is whether the master of the *West Camak* should have given the order to port the helm and reverse the engines within a less time than three seconds from the moment when he suddenly discerned the white light.

(1) 4 P. D. 219.

H. L. (Sc.) 1923

U. S. SHIPPING BOARD v. LAIRD LINE, LD.

Lord Shaw of Dunfermline.

My Lords, we are not dealing with the psychology of a superman but simply that of a ship's captain. One is familiar only too often with cases of collisions being brought about by rashness owing to want of due consideration as to the order to be given, but the present case is different. It is ascribed to the opposite of rashness, and is so minute in its apportionment of blame as this, that the captain of the *West Camak* gave the right order in an emergency, but gave that right order too late by the twentieth part of one minute. I do not see my way to hold in law that that brief and fragmentary period of time for consideration, or before the correct order in the emergency was given, can be held to be blameworthy conduct or legitimately entered as negligence contributing to the collision.

I have always held *The Bywell Castle* (1) to be a case of the highest authority, and I will conclude my own opinion by saying that I think the language of the three great judges—namely, James, Brett and Cotton L.JJ.—may be said to apply in terms to the present case. For instance, Brett L.J. says: "I am clearly of opinion that when one ship, by her wrongful act, suddenly puts another ship into a position of difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. The captains of ships are bound to show such skill as persons of their position with ordinary nerve ought to show under the circumstances. But any Court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances; and the Court ought not, in fairness and justice to him, to require perfect nerve and presence of mind, enabling him to do the best thing possible."

How analogous in point of fact *The Bywell Castle* (1) was to this case may be seen from the language used by James L.J.—namely, "Then there comes the very last thing that occurred on the part of the *Bywell Castle*, which is that she, in the very agony, just at the time when the two ships were close together, hard-a-ported. The judge and both of the Trinity Masters

(1) 4 P. D. 219, 222, 226.

were of opinion that that was a wrong manœuvre. I understand our assessors to agree in that conclusion, but they advise us that it could not, in their opinion, have had the slightest appreciable effect upon the collision. That view, if adopted by us, and I think that it should be adopted, would be sufficient to dispose of the case upon the question of contributory negligence. But I desire to add my opinion that a ship has no right, by its own misconduct, to put another ship into a situation of extreme peril, and then charge that other ship with misconduct. My opinion is that if, in that moment of extreme peril and difficulty, such other ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men."

My Lords, I have thought it right to cite these very authoritative judgments because, if the doctrine there laid down be lost sight of, a region of refinement is apt to be entered upon under which the true responsibility for the substantial wrongdoing may be improperly whittled down and a fanciful wrongdoing may be raised improperly into the region of substance as a contributing cause.

LORD PHILLIMORE. My Lords, I have a lingering suspicion that all was not so well on board this American vessel as appears. But on the findings at which the Lord Ordinary has arrived, and which the Court of Session has accepted, and which your Lordships are not in a position to disturb, the conclusion to which the Lord Ordinary came was right and his judgment should be restored.

LORD DUNEDIN. Lord Blanesburgh has asked me to say that he concurs in the judgment which I have delivered.

Interlocutor of the First Division of the Court of Session in Scotland reversed, and interlocutor

H. L. (Sc.)
1923
U. S. SHIPPING BOARD v. LAIRD LINE, LD.

of the Lord Ordinary restored. Cause remitted back to the Court of Session to do therein as shall be just and consistent with the judgment. The respondents to pay the costs of the action in the Court of Session and also the costs of the appeal to this House.

Lords' Journals, Dec. 18, 1923

Agents for the appellants : *Thomas Cooper & Co., for Fyfe, Maclean & Co., Writers, Glasgow, and Beveridge, Sutherland & Smith, W.S., Leith, Edinburgh.*

Agents for the respondents : *Botterell & Roche, for Maclay, Murray & Spens, Writers, Glasgow, and J. & J. Ross, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1923 *Dec.* 18.

GRAHAM JOINT STOCK SHIPPING COMPANY, LIMITED . . . . . } APPELLANTS ;

AND

MERCHANTS MARINE INSURANCE COMPANY, LIMITED . . . . . } RESPONDENTS.

Insurance (Marine)—Scuttling of Ship by Owner—Mortgage—Action by Mortgagees on Policy—Interest of Mortgagees, whether Original or Derivative.

In December, 1919, the owner of a ship which was in the course of being built created a charge on the ship to secure an advance and agreed with his mortgagees to execute a formal mortgage containing such covenants and conditions as in the opinion of the mortgagees should be necessary for their protection. In May, 1920, when the ship was nearing completion, the owner, by his agent, instructed a firm of insurance brokers to insure her against sea risks, for twelve months from her arrival at a certain port. The brokers negotiated the insurance and wrote to the mortgagees, informing them that the insurance had been effected and that at the request of their client they were holding the policy to the order of the mortgagees to the extent of their interest in the ship. The policy was taken out by the brokers in their own

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* *Present :* VISCOUNT CAVE L.C., VISCOUNT HALDANE, VISCOUNT FINLAY, LORD SUMNER, and LORD PARMOOR.

names " and/or as agents, hereinafter called the assured." The premium was paid by the owner. In July, 1920, the owner executed a form of mortgage of the ship to his mortgagees, and thereby covenanted that the ship should be kept insured at the expense of the owner against risks of every kind, and that all policies of insurance on hull and machinery should be suitably indorsed in favour of the mortgagees and lodged with them along with the mortgage, or with the brokers on their behalf, who should address a letter to the mortgagees, acknowledging that the policies were held on behalf of the mortgagees. The same form of mortgage had been used by the parties in several earlier mortgage transactions in which they were concerned and at the time when the insurance was effected all parties contemplated that the mortgage would take that form. During the currency of the policy the ship was scuttled with the connivance of the owner, but without any connivance or complicity on the part of the mortgagees. In an action on the policy by the mortgagees the broker who effected the policy was called as a witness and stated that he knew at the time that there were mortgagees and that he intended to cover whomsoever might be concerned:—

Held, that the proper inference to be drawn from the documents was that the insurance was effected on behalf of the owner and that the title of the mortgagees rested on an equitable assignment from him, and that this inference was not displaced by the oral evidence; and that, as the mortgagees were not independently insured, they were affected by the fraud of the owner and could not recover on the policy.

Decision of the Court of Appeal [1923] 1 K. B. 592 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Greer J.

The appellants were mortgagees of the Greek ship *Ioanna*, which was insured by the owner, Elie Angelis, a Greek subject, under a policy of marine insurance dated June 15, 1920. The ship was scuttled by the owner during the currency of the policy and was totally lost. The appellants claimed to recover under the policy to the extent of their interest as mortgagees. The substantial question on the appeal was whether on the facts the policy was effected on behalf of the owner and by his authority assigned to the appellants as mortgagees or whether it was effected on behalf of the owner and the mortgagees.

Greer J. decided that the appellants were direct parties to the contract contained in the policy and were entitled to recover, but his judgment was reversed by the Court of Appeal (Bankes and Scrutton L.JJ. and Eve J.), who held

(1) [1923] 1 K. B. 592, 606.

H. L. (E.) 1923

GRAHAM JOINT STOCK SHIPPING CO. v. MERCHANTS MARINE INSURANCE CO.

that the interest of the appellants in the policy was derivative only.

The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the judgment of the Lord Chancellor.

1923. Nov. 1, 2. *Sir John Simon K.C.* and *Jowitt K.C.* (with them *James Dickinson*) for the appellants. Greer J. was right on the facts in saying that the mortgagees were directly insured. There was here an obligation on the owner to secure that the mortgagees were insured, and the parties contemplated that there should be one insurance on the ship and that that should enure to the benefit of both the owner and the mortgagees. The intention of the broker in negotiating the policy is material, and the Court of Appeal were wrong in treating the evidence of the broker that he intended to cover all who might be concerned as inadmissible. If a man contracts as principal no one can afterwards come in and ratify, but if he contracts as agent and has A. B. in his mind then A. B. can ratify, assuming that he has an insurable interest in the ship. The interest of the mortgagees in the policy is original and not derivative. The policy was not assigned by indorsement or otherwise to the mortgagees. If there had been an assignment by special indorsement, which is now the only customary way of assigning, that would indicate a derivative interest, in which case they would be affected by the fraud of the owner; but in the absence of such assignment, it being clear that they are interested, the inference is that their interest is original. [They referred to *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.* (1); *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (2); *Small* v. *United Kingdom Marine Mutual Insurance Association* (3); *Yangtsze Insurance Association* v. *Lukmanjee* (4); *Baker* v. *Adam* (5); *Keighley, Maxsted & Co.* v. *Durant* (6); *Byas* v. *Miller* (7); *Watson* v.

(1) [1905] 1 K. B. 637; [1906] A. C. 336, 339.
(2) [1918] A. C. 350.
(3) [1897] 2 Q. B. 42, 311.
(4) [1918] A. C. 585.
(5) (1910) 15 Com. Cas. 227, 230–1.
(6) [1901] A. C. 240.
(7) (1897) 3 Com. Cas. 39.

Swann (1); *Fred. Drughorn, Ld.* v. *Rederiaktiebolaget Transatlantic* (2); Arnould on Marine Insurance, 10th ed., vol. i., § 173.]

R. A. Wright K.C. and *Claughton Scott K.C.* for the respondents were not called on.

The House took time for consideration.

1923. Dec. 18. VISCOUNT CAVE L.C. In the course of the proceedings in this action a good many defences have been raised on behalf of the respondents, but the only question argued on this appeal is one of fact—namely, whether the policy of marine insurance on the *Ioanna*, upon which this action is brought, was effected on behalf of Angelis, the owner of the vessel, and by his authority assigned or made over to the appellants as his mortgagees, or whether it was effected on behalf both of the owner and of the mortgagees. If the former was the case, then, as the vessel is found to have been thrown away by the authority of the owner, the appellants claiming under him cannot recover upon the policy (Marine Insurance Act, 1906, s. 50, sub-s. 2); but if the policy was effected on behalf of the mortgagees as well as on behalf of the owner, so that the mortgagees were directly insured, then it would have to be considered whether they can recover upon the policy notwithstanding the fraud of the owner.

On this issue of fact the documentary evidence is as follows: On December 1, 1919, when the ship was in course of being built for Angelis by Messrs. Doxford & Co., of Sunderland, Angelis created a charge upon the ship in favour of the appellants to secure a large sum advanced by them to him. The deed of charge made no mention of insurance, but it was a term of the deed that the owner should in due course execute in favour of the mortgagees a formal mortgage containing such clauses, covenants and conditions as in the opinion of the mortgagees or their legal advisers should be necessary or advisable for their protection. There was a further charge dated March 10, 1920, and there were also

(1) (1862) 11 C. B. (N.S.) 756. (2) [1919] A. C. 203.

H. L. (E.) 1923 GRAHAM JOINT STOCK SHIPPING CO. v. MERCHANTS MARINE INSURANCE CO. Viscount Cave L.C.

some agreements for consolidation of securities; but these documents carried the matter no further so far as the point now under discussion is concerned. Early in May, 1920, when the ship was about to be completed, and delivered to Angelis, Mr. J. A. Mango, who held a power of attorney for Angelis, instructed Messrs. J. W. Hobbs & Co., who are insurance brokers, to insure her against sea risks for twelve months from the arrival of the ship at Newcastle-upon-Tyne. The brokers accordingly got the risk underwritten by the respondents and others, and on May 18 they wrote to the appellants' agents as follows:—

"*S.S. Ioanna.*

"We beg to advise you that we have effected the insurance on the above vessel for 12 months from date to be advised, on hull and machinery valued 275,000*l.*, as follows:—

275,000*l.* Institute Time Clauses.
68,750*l.* Freight.
41,250*l.* Disbursements.

"At the request of our client, Mr. J. A. Mango, we agree that we are holding the policies to your order to the extent of your interest in the vessel, subject to our lien for unpaid premiums, and to our having the right to cancel the policies should the premiums not be paid, it, of course, being understood that we should not so act without first advising you."

Mr. Mango subsequently instructed Messrs. Hobbs & Co. that the period of twelve months was to run from May 29, and this was arranged accordingly. The policy issued by the respondents is dated June 15, 1920, and purports to be effected by "J. W. Hobbs & Co. and/or as agents hereinafter called the Assured"; and the respondent company thereby "promises and agrees with the Assured their executors administrators and assigns" to make good loss or damage happening to the ship by (among other things) perils of the sea and barratry up to the sum of 15,000*l.* There is the usual f.c. and s. clause, war risks being separately insured. The policy bears upon the back of it the signature "J. W. Hobbs & Co.," apparently by way of general indorsement. The premium was paid by Angelis. On July 28, 1920, Angelis

executed a form of mortgage of the ship to the appellants to secure the amount which was owing to them, and this mortgage contained the following covenant :—

"Eighth. The said steamship shall be insured at the expense of the Owner against all risks of every kind especially including risks resulting from the recent War and any other War Risks and that to the extent of not less than the amount of the said loan from time to time outstanding and shall be kept so insured during the currency thereof and all policies of insurance on which the premiums have been fully paid over the hull machinery and appurtenances of the said steamship shall be suitably endorsed in favour of the Mortgagees and shall be lodged either with them along with the Mortgage or with Messrs. Jos. W. Hobbs & Co. of 260 Gresham House London E.C. on their behalf in which event the said Messrs. Jos. W. Hobbs & Co. shall address to the Mortgagees a letter stating the details of the policies and acknowledging that they are held to the order of and on behalf of the Mortgagees."

At first sight, it may appear strange that Messrs. Hobbs & Co., in writing the letter of May 18, 1920, should have anticipated so closely the provisions of a covenant which was not executed until the following July ; but it appears that there had been earlier mortgage transactions between Angelis and the appellants in which the same form of mortgage had been used, and the Court of Appeal inferred (no doubt rightly) that all parties took it that the mortgage of the *Ioanna* would be in that form. The ship was thrown away off the coast of Spain on February 19, 1921, and was a total loss.

My Lords, if the above documents stood alone, the inference would, I think, be irresistible that the insurance was effected on behalf of the owner, Angelis, and that the title of the appellants rested on an equitable assignment from him effected by the covenant and the letter of May 18. The instructions to insure were given by Mango, the owner's agent, on the owner's behalf, and it was at his request (as appears by the letter of May 18) that the brokers informed the appellants that they held the policy to their order to the extent of their interest. The premium was paid by the

H. L. (E.) 1923

GRAHAM JOINT STOCK SHIPPING CO. v. MERCHANTS MARINE INSURANCE CO.

Viscount Cave L.C.

owner, and there was no evidence that the appellants took any part in the transaction of insurance. But there is a piece of oral evidence which requires consideration. When the plaintiffs' case had been closed, and Mr. Wright on behalf of the respondents had raised the point that the mortgagees were not independently insured under the policy, counsel for the appellants asked and obtained leave to call evidence on that point. He accordingly called Mr. P. J. Hobbs, a member of the firm of J. W. Hobbs & Co., who on being examined in chief said that he knew of the mortgage to the appellants and proved the letter of May 18, but gave no evidence as to any direct insurance on behalf of the appellants; and it was only in the last two answers in his re-examination that he gave the following evidence:—

"*Q.* You have told us that when Mr. Mango instructed you you knew that Mr. Angelis was the owner and you knew that there were mortgagees?—*A.* That is so.

"*Q.* When you insured, whom did you intend to cover?—*A.* Whomsoever might be concerned."

It was urged on behalf of the appellants that these answers were sufficient to show that Hobbs & Co., when they entered into the contract of insurance with the respondents, intended to and did so contract as agents not only for Angelis but also for the appellants, and that, as the appellants had adopted the contract by suing upon it, there was enough to give them a separate contractual interest upon which they could sue. I do not think that this is the true effect of the evidence. The policy in question in this case is not, as in the usual Lloyd's policy, effected by the broker "in the name of every person to whom the same doth, may, or shall appertain in part or in all." It is effected by the brokers for themselves "and/or as agents," and the question is, on whose behalf they, "as agents," intended to and did enter into the contract. Now Hobbs & Co. had no authority other than that which they derived from Mango—namely, to insure as agents for the owner—and the documents show plainly that they acted under that authority and not otherwise. The witness P. J. Hobbs did not say that he acted as agent for the

appellants, but only that he intended to cover whomsoever might be concerned. His own letter, written at the time, treated Mango as his principal, and the appellants as persons to whom an interest was to be given on Mango's request; and I do not think that the inference to be drawn from this letter can possibly be displaced by his vague oral statement made two years later when the position of the parties was in dispute. Mango, who was available as a witness, was not called. I think that the Court of Appeal was right in setting aside Mr. Hobbs' answer and in accepting and acting upon the documents as the only relevant and reliable evidence on this point; and, if so, the appellants were not independently insured.

Having regard to the above conclusions, it is unnecessary to consider the other defences raised in the action, and I express no opinion upon them. In my opinion, this appeal fails and should be dismissed with costs.

My Lords, my noble and learned friends, Lord Finlay and Lord Parmoor, desire me to say that they concur in this judgment.

VISCOUNT HALDANE. My Lords, I concur in the opinion that has just been expressed by the Lord Chancellor and I have nothing to add.

LORD SUMNER. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 18, 1923.

Solicitors for the appellants: *Thomas Cooper & Co.*
Solicitors for the respondents: *Pritchard & Sons.*

[HOUSE OF LORDS.]

H. L. (E.)* 1923 Dec. 18.

UPTON . . . . . APPELLANT;

AND

GREAT CENTRAL RAILWAY COMPANY RESPONDENTS.

Workmen's Compensation—Arising out of and in Course of Employment—Railway Labourer returning from Work—Slip on Platform when hurrying for Train—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A labourer in the employment of a railway company was directed to travel from A. station to B. station to repair a water main near the latter station. After finishing his work he returned to B. station and awaited the arrival of the train for A. As the train came in he hurried across the platform to reach the proper carriage and slipped and hurt his knee, and he died as the result of the injury. It was admitted that the injury arose in the course of his employment.

Upon a claim by his widow for compensation under the Workmen's Compensation Act, 1906:—

Held, that, inasmuch as the man was crossing the platform where the slip occurred in fulfilment of the implied direction of his employers, the injury arose out of the employment.

Decision of the Court of Appeal [1923] 2 K. B. 879 reversed.

APPEAL from an order of the Court of Appeal affirming an award of the county court judge of Lancashire sitting at Ashton-under-Lyne as arbitrator under the Workmen's Compensation Act, 1906.

The appellant, the widow of Alfred Upton, claimed compensation from the respondents in respect of the death of her husband from blood poisoning consequent on an injury to his knee owing to his falling on the platform at Dunford Bridge Station on September 17, 1922.

The facts found by the county court judge and set out in the judgment of Viscount Haldane were as follows:—

"Alfred Upton, who was a foreman labourer in the employment of the respondents, was sent from Guide Bridge on the date mentioned to work for them on a water main near Dunford Bridge Station. After finishing his work he proceeded to the latter station in order to return by train to

* *Present:* VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

Guide Bridge. He was waiting with other workmen for the train. It was a wet, windy day. The train came in. He went hurriedly across the platform to reach the proper carriage. He slipped and fell, injuring his knee. As the result the injury caused his death."

It was admitted by the respondents that the employment of the deceased continued until he arrived back at Guide Bridge Station, and the only question in dispute was whether the injury arose out of the deceased's employment.

The county court judge was not satisfied that the accident arose out of the employment and made an award in favour of the respondents. After referring to certain passages in the judgment of Lord Shaw of Dunfermline in *Thom* v. *Sinclair* (1) he said that the result was that in cases where it was proved that there was something in the employer's premises which caused the accident, that something was in the nature of a peril, and being attached to the particular location it came within Lord Shaw's language. If he were satisfied that the fall of the deceased was due to any peril upon the platform he would find that this accident arose out of the employment, but he could not say what caused the fall. It was certainly not inconsistent with the absence of any peril upon the platform. The suggestion that the platform was slippery was not borne out by the evidence. The rain was only relevant so far as it might cause the platform to be slippery. He did not find that there was anything corresponding to a special zone of danger within which the workman was brought.

The Court of Appeal by a majority (Lord Sterndale M.R. and Scrutton L.J.; Warrington L.J. dissenting) affirmed the award of the county court judge.

1923. Nov. 22, 23. *Shakespeare* (with him *Berryman*) for the appellant. Recent decisions of this House establish (1.) that "in the course of the employment" means in the course of the work which the workman is employed to do and what is incidental to it; and (2.) that, if the employment is the

(1) [1917] A. C. 127, 142–3.

H. L. (E.) 1923 UPTON v. G. C. RY. CO.

cause of the injury, the injury arises out of the employment: *Thom* v. *Sinclair* (1); *Dennis* v. *White & Co.* (2); *Davidson & Co.* v. *M'Robb* (3); *Armstrong, Whitworth & Co.* v. *Redford.* (4) The test is—is the risk incurred as a workman or as a member of the public? The accident here arose because of the employment and, that being so, it is not necessary that there should have been any special reason for slipping: *Millar* v. *Refuge Assurance Co.* (5), which has been followed in *White* v. *Avery* (6) and has been approved by this House in *Arkell* v. *Gudgeon* (7) and *Thom* v. *Sinclair* (8); and see *Wright & Greig* v. *M'Kendry.* (9)

[He also cited *Fearnley* v. *Bates & Northcliffe* (10); *Blake* v. *Ramsay* (11); *Wales* v. *Lampton and Hetton Collieries* (12); *Marsh* v. *Pope & Pearson* (13); *Bett* v. *Hughes* (14); *Clark* v. *Lord Advocate* (15); *Hunter* v. *Simner.* (16)]

Barrington-Ward K.C. (with him *Beazley*) for the respondents. This was merely a risk common to all mankind; it had no causal relation to the deceased man's employment. In *Millar's Case* (5) there was direct evidence of the causal relation between the accident and the employment. The injury by accident in this case was due to an ordinary failure of the body in the physical act of walking. There was no special danger arising from the state of the platform. In order that an accident should arise out of the employment there must be some evidence which converts a general risk into a special risk. *Chapman* v. *S.S. John W. Pearn* (17) is valuable as illustrating the difference between arising out of and in the course of the employment.

(1) [1917] A. C. 127.
(2) [1917] A. C. 479, 481, 489, 493.
(3) [1918] A. C. 304.
(4) [1920] A. C. 757.
(5) 1912 S. C. 37; 5 B. W. C. C. 522.
(6) 1916 S. C. 209; 9 B. W. C. C. 663.
(7) (1917) 118 L. T. 258; 10 B. W. C. C. 660.
(8) [1917] A. C. 127, 139.
(9) (1918) 56 S. L. R. 39, 41; 11 B. W. C. C. 402, 407.
(10) (1917) 10 B. W. C. C. 308.
(11) (1916) 51 Ir. L. T. 6; 10 B. W. C. C. 500.
(12) (1917) 10 B. W. C. C. 527.
(13) (1917) 10 B. W. C. C. 566.
(14) (1914) 52 S. L. R. 93; 8 B. W. C. C. 362.
(15) (1922) 59 S. L. R. 442; 15 B. W. C. C. 320.
(16) (1921) 14 B. W. C. C. 327.
(17) (1916) 9 B. W. C. C. 224.

[LORD DUNEDIN. That case cannot stand with *Arkell* v. *Gudgeon*. (1)]

[Counsel also referred to *Morgan* v. *Bettisfield Colliery Co.* (2) ; *Plumb* v. *Cobden Flour Mills Co.* (3) ; *Rodger* v. *Paisley School Board* (4) ; *Allcock* v. *Rogers*. (5)]

Shakespeare replied.

The House took time for consideration.

1923. Dec. 18. VISCOUNT HALDANE. My Lords, in this case it is not in dispute that Alfred Upton, the husband of the appellant, died of blood poisoning following on an injury to his knee, due to his having accidentally slipped on the platform at Dunford Bridge Station on September 17, 1922. Nor is it in dispute that the accident happened to him in the course of his employment. The respondent railway company have further very readily agreed that, if they are liable, the amount payable to the appellant may be taken as being the full amount of 300*l*. The real question which the appeal raises is whether they are free from liability on the ground that the accident did not arise out of the deceased workman's employment. The learned county court judge who disposed of the case held that the accident did not so arise, and the Court of Appeal (Warrington L.J. dissenting) affirmed the decision.

My Lords, the question is one of delicacy and difficulty, because of some obscurity as to principle due to the state of the authorities. The facts lie in small compass. [His Lordship stated the facts as above set out.] It will be convenient in the first place to ask what the natural answer to the question raised would be. If one looks only to the words of the Workmen's Compensation Act of 1906, and then to see how far the decided cases hinder such an answer, there is little room for doubt, either on principle or on authority, that the accident arose in the course of the

(1) (1917) 118 L. T. 258; 10 B. W. C. C. 660.
(2) (1922) 15 B. W. C. C. 52.
(3) [1914] A. C. 62, 68.
(4) (1912) 49 S. L. R. 413; 5 B. W. C. C. 547.
(5) (1918) 11 B. W. C. C. 149.

H. L. (E.) 1923 UPTON v. G. C. RY. CO. Viscount Haldane.

employment. That the deceased man should have been waiting for the train at the station, and should have had to cross the platform in order to get into it, fell within the conditions on which he was employed. The accident happened while he was doing something that was incidental to his employment. It did not occur merely during a period in which he was in the employment of the respondents. I agree with the interpretation placed on the words " in the course of " by Lord Dunedin in *Davidson & Co.* v. *M'Robb* (1) and subsequently in *Armstrong, Whitworth & Co.* v. *Redford* (2), and think that, interpreted in the limited sense that the workman must be doing something which in contemplation of law is part of his service, the workman was in the circumstances before us doing what made the accident which happened to him happen in the course of his employment. This, indeed, is not in dispute.

That Upton might have avoided slipping if he had exercised more care may possibly be true. But unless the injury was attributable to serious and wilful misconduct on his part, which is not alleged, compensation can be claimed. Moreover, his carelessness cannot bar the claim, because death has ensued. Sect. 1, sub-s. 2 (*c*), of the Workmen's Compensation Act, 1906, puts this beyond question. The only issue which is open is whether an accident like this, whether avoidable or not, was one arising out of the employment in the course of which it was caused.

Now the expression " arising out of " no doubt imports some kind of causal relation with the employment; but it does not logically necessitate direct or physical causation. If there had been a hole or an unusually slippery place on the platform which gave rise to the fall, that would have been a plain illustration of direct and also physical causation. But the statute does not prescribe such causation as this as being required before a claim can arise. The right given is no remedy for negligence on the part of the employer, but is rather in the nature of an insurance of the workman against certain sorts of accident. The Legislature appears to have

(1) [1918] A. C. 304. (2) [1920] A. C. 757.

provided that he is to be insured against certain injuries by accident which may happen to him, provided they arise out of the conditions under which he is employed. That the accident should have arisen out of his fulfilment of these conditions seems to be all that is required to establish the only kind of causation that is demanded. The expression "cause" may always be regarded as including an infinity of conditions, but in ordinary life we have to look for those which are relevant to the standpoint of inquiry. A direct physical cause will, of course, fall among those which are included in s. 1 of the Workmen's Compensation Act, but the scope of the Act and the inquiry which it enjoins appear to extend also to the general conditions under which the workman has been directed to act. If he simply dies of heart disease the effect of which has not been aggravated by anything which his employment led to his doing, or if he is struck by lightning in a place where the conditions of his employment rendered him no more exposed to danger than any member of the public not so employed, the injury will not have resulted from the conditions under which he was being employed. But if, for example, he is sent on a message on a bicycle and an ordinary collision which might have happened to anybody takes place, then what has happened would not have done so had he not been engaged in fulfilling his duty, and there is liability.

My Lords, looking at the object which the statute discloses by its language, I think that that language directs us to interpret the kind of causal relation required as satisfied by cases in which there has been injury by accident arising out of what the workman had to do, merely because of the conditions of his employment, as distinguished from being directly physically caused by it. It is not easy to lay down with precision how far such conditions may extend. The mere fact that they have arisen in the course of the employment is not in itself sufficient. They must be such that the accident has some sort of causal relation with them, although not necessarily an active physical connection.

If, in the course of his employment, the workman meets

H. L. (E.) 1923 UPTON v. G. C. RY. CO. Viscount Haldane.

with injury by an accident which has arisen directly out of circumstances encountered because to encounter them fell within the scope of the employment, compensation may be claimed. His own negligence may have been an immediately contributing factor. If, as in the present case, his death has resulted, such negligence is immaterial. The question is whether circumstances such as I have referred to are to be found among the causal conditions of the accident. These may have amounted to no more than passive and inert surroundings, requisite only to provide circumstances which admitted of the accident being occasioned by his own movement. Active physical causation by the surroundings is not required in order to satisfy what is implied by the expression "arising out of the employment."

Now in the case before us the man was crossing the platform in fulfilment of the implied direction of his employers. He might have escaped accident had he been more careful, but no such negligence as may have occurred was in law sufficient to take his case outside the statute. So far, therefore, as it is open to us to decide the question as one of principle merely, I think that the accident plainly arose out of the conditions of the employment. These conditions seem to me to have been its origin sufficiently to bring it within the kind of risk defined for which compensation by way of insurance is to be provided.

My Lords, so far as the authorities are concerned, these were up to about the year 1917 in a state which disclosed considerable differences in judicial opinion as to the kind of causation required. But in that and subsequent years decisions have been given by your Lordships' House in which the state of the authorities was reviewed, and in which certain principles were authoritatively laid down. Among these decisions are *Thom* v. *Sinclair* (1); *Stewart & Son* v. *Longhurst* (2); *Dennis* v. *White & Co.* (3); and *Davidson & Co.* v. *M'Robb.* (4) I think that the interpretation which I have placed on the language of the statute in reference to the kind

(1) [1917] A. C. 127.
(2) [1917] A. C. 249.
(3) [1917] A. C. 479.
(4) [1918] A. C. 304.

of causal relation required, whether or not it is wholly consistent with some earlier interpretations here and in Scotland, is at least in harmony with the views authoritatively expressed in this House in the decisions I have quoted and in others which followed them later.

I am therefore of opinion that the decision of the majority in the Court of Appeal should be reversed, and that the case must go back to the county court for entry of an award for 300*l.*, the amount agreed by the respondents in case they should be held liable, and to be disposed of in accordance with our judgment. The appellant should have her costs here and in the Courts below.

LORD DUNEDIN. My Lords, the arbitrator begins his judgment by saying, "I received an admission from the respondents' solicitor that the employment of the deceased continued until he arrived back at Guide Bridge Station," and he further explains this statement by saying, "There is no dispute on the facts that the accident arose in the course of the deceased's employment."

Now, when an admission is made it must be construed in accordance with the legal meaning of the words used, as these words have been authoritatively defined. What exactly is meant by "in the course of employment" was most fully discussed, and, I think, authoritatively decided, in the case of *Davidson & Co.* v. *M'Robb.* (1) I will quote a single sentence from my own judgment in that case: "It (i.e., the course of employment) connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master." I take it, therefore, that the injured man here was doing the work of his master when he was crossing the platform to reach the train.

That being so, I find it quite impossible to distinguish this case from the case of *Millar* v. *Refuge Assurance Co.* (2) In that case the man was doing the work of his employers in ascending and descending the common stair in the course

(1) [1918] A. C. 304, 321. (2) 1912 S. C. 37; 5 B. W. C. C. 522.

H L. (E.) 1923 UPTON v. G. C. RY. CO. Lord Dunedin.

of his employment to collect premiums. He slipped and fell. There was no suggestion that the stair was faulty in any way. That case, being only decided in the Court of Session, is not binding on your Lordships, though it expresses my own opinion. But I find that in the case of *Arkell* v. *Gudgeon* (1) it was distinctly approved in this House. It does not seem to have received the attention of the learned judges who formed the majority in this case. I said in the case of *Millar* (2) that the distinction between accidents which happen to a man and are, so to speak, brought on him by his business, and accidents which, although a man may in one sense be on his business, are just accidents which may happen to everybody, is a very fine one. So it is. Lord Kinnear in the same case put it thus: "I think that a risk is specially connected with a man's employment if it is due to the particular place where his employment requires him to be at the time." This man's employment compelled him to cross the platform, and it was there that a slip occurred. The slip was connected with his presence on the platform.

I therefore concur in the motion made.

LORD ATKINSON. My Lords, I concur. In construing the language of the Workmen's Compensation Act one must, I think, have regard to the habits of members of the general public in doing such an act as the workman may be employed by his employer to do. For instance, if an employer should order his workman to travel from Station A. to Station B. on a particular line of railway, to do certain indicated work at or near B., and then travel back from B. to A. by train, he must, I think, be held by implication to have authorized his workman to do everything that according to the ordinary usages and practices of the travelling public is involved in the adventure of this travelling by train. Should his workman arrive at Station B. before the arrival there of the returning train that is to carry him back to A., and should it happen to be raining at the time, as it was in this case, he, the workman,

(1) 10 B. W. C. C. 660. (2) 1912 S. C. 41, 43.

would, I think, unquestionably be acting in the course of his employment in taking shelter in a waiting-room and, when the returning train arrived at Station B., in traversing the platform to get into a carriage of the train in which he would be authorized or entitled to travel. These are the kind of things that in ordinary railway traffic are done by the travelling public, and the employer must, it would appear to me, be held to have impliedly authorized the workman to do them. If so, in doing them, the workman would be discharging a duty to his master imposed upon him by his contract of service, and the accident which befell him would undoubtedly have happened in the course of his employment. Joseph Potter states shortly and clearly how the accident occurred. He says: "It was a nasty day—raining and windy. We arrived at station, waited in waiting-room—six of us. On approach of train four went out—two, myself and Upton were behind. Train pulled up—first-class carriage in front of us, we all went towards left to third class. I and Upton were the last two. As Upton was running to third class compartment, Upton fell. He slipped with his left foot and fell on left knee, and then rolled over on to the side. The platform was wet, so were we." On cross-examination, he says there was nothing unusual on the platform. It was intact! It cannot be suggested that Upton's running across the platform to reach the third-class carriage of the train amounted to "serious and wilful misconduct." And it is well established that a workman is not deprived of his right to compensation by doing negligently something which his employer has expressly or impliedly authorized him to do. The law is so laid down quite clearly in *McNicholas* v. *Dawson & Son*. (1) Collins L.J. (as he then was) is reported to have stated the rule of law upon this point thus: "Under the Workmen's Compensation Act, 1897" (there is no difference between this statute and the Act of 1906 on this point), "it is not necessary to prove negligence on the part of the employer, and it is no defect in the workman's case that he has been guilty of contributory negligence. If he brings himself

(1) [1899] 1 Q. B. 773, 778.

H. L. (E.) 1923 UPTON v. G. C. RY. CO. Lord Atkinson.

within the Act by shewing that the accident arose out of and in the course of his employment, his case can only be met by the employer by shewing that the injury to the workman is attributable to his serious and wilful misconduct; so that the element of negligence may be eliminated from this case. The deceased was doing something which it was his duty to do, though he may have been negligent in doing it. Probably there may be acts of negligence on the part of a workman so entirely outside his employment as to prevent an accident following on the negligent act from being described as arising out of his employment."

In *Frazer* v. *John Riddell & Co.* (1) an engine driver in the course of his employment fell off the traction engine he was driving and was killed. His fall was due to his being intoxicated. It was held that this did not preclude his widow from recovering, intoxication not being of itself a defence in fatal accidents.

In *Williams* v. *Llandudno Coaching and Carriage Co.* (2) a workman was engaged by the respondents as a stableman, whose duty it was to chop and mix food for horses and to convey it by carts to various stables. The loft in which he performed part of his duties was reached by a vertical ladder fixed a little distance from the wall, which the workman, to carry out his work, had to ascend and descend. In attempting to ascend the ladder to do his work the workman, who was intoxicated, fell, receiving injuries from which he died. Swinfen Eady L.J. said: "It was urged by the appellants (the employers) that the real cause of the accident was the drunkenness of the deceased, and therefore that his widow could not recover, although if he had been sober and the accident had happened, it might be said to have arisen out of and in the course of his employment." He then said: "The cases establish the proposition that if an accident occurs while the workman is acting within the scope of his authority, and is doing an act which it was part of his duty to do, and the accident arises from his being engaged in doing that act and being thereby exposed to a special risk beyond

(1) (1913) 7 B. W. C. C. 841. (2) [1915] 2 K. B. 101, 107, 108.

that of other persons not so engaged, the employer is liable to pay compensation, although the workman is doing the act negligently or contrary to rules laid down for his guidance." He refers to the cases of *Mawdsley* v. *West Leigh Colliery Co.* (1), where a workman was engaged to oil machinery, but was forbidden to do that while the machinery was in motion, and to *Chilton* v. *Blair & Co.* (2), where a workman was employed to turn a wheel on a rolling machine, but forbidden to do so sitting down, and winds up by saying, "If a state of facts is proved which brings the workman within the proposition I have stated, the fact that he was drunk when the accident happened, or indeed the fact that the proximate cause of the accident was his drunkenness, will not disentitle him or in the case of death his dependants from recovering compensation from his employer where death or serious and permanent disablement results."

The case which most nearly approaches the present, but is on the facts quite distinguished from it, is that of *Jibb* v. *Chadwick.* (3) There the workman, a foreman joiner, who lived at Rotherham, near Sheffield, and was in the employment of the appellants, who carried on business at Rotherham, but had contracts for works to be executed at Sheffield, was sent by his employers to Sheffield, travelling there by train. He had a season ticket on the railway from Rotherham to Sheffield, for which his employers paid. He was on the day of the accident instructed by his employers to return to Rotherham before 6 o'clock in the evening and report what work had been done at Sheffield in the course of the day. The last train which would have brought him to Rotherham before 6 P.M. left Sheffield at 5.26 P.M. On the evening in question he arrived rather late at the station. This train was actually in motion as he entered the station. He ran and attempted to get into the moving train, but he fell between it and the platform, was carried forward by the train 150 yards before it could be stopped and received injuries from which he died. No evidence was given to show that the

(1) (1911) 5 B. W. C. C. 80. (2) (1914) 7 B. W. C. C. 607.
(3) [1915] 2 K. B. 94.

H. L. (E.) 1923 UPTON v. G. C. RY. CO. Lord Atkinson.

deceased could not have arrived earlier at the station. It was held that it was an illegal act on his part to attempt to get into a train while in motion, and that he, the workman, in endeavouring to do this unauthorized and illegal act, exposed himself to an additional risk not expressly or by implication incidental to his employment, and was, therefore, not entitled to compensation. So that according to this case, if Mrs. Upton would have been entitled to compensation if her husband had, while walking carefully across the platform to enter the third-class carriage, fallen and injured himself as he did in fact fall and injure himself, she could not legally be deprived of compensation by reason of the fact that he was running, not walking, when he fell.

It was urged in argument on behalf of the respondents that Upton's running across the platform and his fall had nothing to do with his employment, just as it was urged in *Williams* v. *Llandudno Coaching and Carriage Co.* (1) that the real cause of the accident was the drunkenness of the deceased workman. I cannot concur in this view. In running as Upton did, he was in the course of doing, although incautiously it may be, what he was employed to do—namely, to return by train to the station from which he had departed in the morning. That employment obliged him, in order to do his duty to his employer, to get into the train and return by it, and the accident which arose from the effort, incautious though it may have been, to discharge that duty was the cause of the injury. I think, therefore, that the accident by which Upton lost his life arose out of and in the course of his employment and that his widow is entitled to recover compensation.

I do not find that in *Wright & Greig* v. *M'Kendry* (2) the concrete flooring upon which the workman slipped and fell, fracturing his skull, was found to be dangerous to walk on. The same applied to the floor in *Hunter* v. *Simner.* (3) Nor were the stairs upon which the collector fell in *Millar* v. *Refuge Assurance Co.* (4) found to be more difficult to

(1) [1915] 2 K. B. 101.
(2) 11 B. W. C. C. 402, 417.
(3) 14 B. W. C. C. 327.
(4) 5 B. W. C. C. 522.

walk on or more dangerous than ordinary stairs of their kind. In *Armstrong, Whitworth & Co.* v. *Redford* (1), a decision of this House by which, so far as it is a decision on a point of law properly raised in the case, we are bound, the main question in controversy was whether the accident which the respondent met with in descending the stairs from the canteen in order to clock on—i.e., to return to her work—was an accident sustained by her "in the course of her employment." Here the accident was caused by the performance of an act the deceased was employed to perform—namely, to traverse the platform if need arose for the purpose of getting into the proper class in the returning train. That was an act obviously done in the course of the employment of the deceased. It may have been done incautiously, but, having been done in the course of the employment of the deceased, and the accident having been caused by the doing of it even incautiously, it must, I think, be held that the accident arose out of the employment of the deceased. I accordingly think that the appeal succeeds and that the order appealed from must be reversed.

LORD SUMNER. My Lords, in view of the decided cases, I do not think that it can now be held that a man may not meet with an accident arising out of his employment, if he falls and injures his knee, while running at a time and place when and where he is employed to run. The reason why he fell may be unknown, for to say that he fell because he slipped is rather a description of the manner than of the cause of his fall, but the fall arises out of his running, since he would not have fallen if he had been sitting down or standing still, and being attended with damage it is, in ordinary language, an accident.

The difficulty of this case arises out of the finding in the award that the accident arose in the course of the deceased's employment, a finding apparently based on an admission "that his employment continued till he arrived back at Guide Bridge Station." I agree that the finding must be

(1) [1920] A. C. 757.

H. L. (E.) 1923 UPTON v. G. C. RY. CO. Lord Sumner.

taken as it stands, though I strongly surmise that the admission was misunderstood. It is not impossible that a man should be employed to go from Guide Bridge Station to Dunford Bridge Station, thence to the water main, and, after repairing it, back to the station and so by the next train to Guide Bridge Station again, but I question if that was so here, and still more do I feel reluctant to say that the deceased was employed to hurry across the platform or even to go home by the next train or by train at all. It is more probable that he had a railway pass, if he liked to use it, and could count for pay the time necessary for returning in the next train, whether he took the train or not. If so, questions as to the ambit of the employment, as to the special risks run by the workman at the place of the accident and the general risks run by the public there, and other difficult questions of the same kind would arise. As it is, I think they do not, and the case falls to be decided on an assumption of fact not likely to recur in many other cases. I think, however, that the appeal succeeds.

LORD BUCKMASTER (read by LORD DUNEDIN). My Lords, in this case the county court judge has found that the accident which resulted in the death of Alfred Upton was an accident in the course of his employment. Unless it can be shown that the learned judge had no evidence before him to support this conclusion, or that he misconstrued the phrase "in the course of his employment," his decision is final.

In my opinion, neither of these conditions is established, and it results that all that is left for consideration is whether the accident arose out of the employment. I think it did. While in the course of his employment the man slipped on a railway station. I can see no difference between this and a similar misadventure arising while a man was passing in a factory from one machine to another. It is true that a railway station is no part of factory buildings, but this, to my mind, makes no difference. The idea of some general catastrophe, such as a thunderstorm, to which all people

alike, independent of employment, may be subject, does not arise. It was, indeed, suggested that as anybody might have slipped down on the railway station, the fact that this man so slipped disentitles him to recover. The answer is that he was on the railway platform and using it in the course of his employment, and I think it impossible to measure the exact standard of danger which the platform must present in order to establish what counsel for the respondents call a special risk. Had he slipped on a banana skin the case would have been parallel to that of the boy injured by collision on a bicycle; but as between the slipperiness due to the presence of foreign matter and the actual slipperiness which must have existed I see no means of drawing a line. That he slipped is certain, and the particular condition of the actual spot where he fell is incapable of determination. I think, therefore, that his accident arose out of his employment.

I find it difficult to distinguish this case from the case in the Court of Appeal in *Holmes* v. *Great Northern Ry. Co.* (1), which, I think, was rightly decided. There, as here, the man was directed to go from one railway station (King's Cross) to another, in that case to clean engines. He crossed the railway lines when he might have used a bridge, and was injured by a train before he arrived at the actual work he had to do. A. L. Smith L.J. decided that he was entitled to recover, as his employment began from the moment when he left King's Cross station. It would, in my opinion, have made no difference if he had slipped on the rails, as indeed was suggested by A. L. Smith L.J. in the course of the argument; and further, I see no difference between slipping on the rails and slipping on the platform. I, therefore, think that this appeal should be allowed.

Order of the Court of Appeal reversed, and cause remitted back to the county court judge with a direction to make an award for 300*l. in favour of the appellant, and to do therein*

(1) [1900] 2 Q. B. 409, 411.

H. L. (E.)
1923
UPTON
v.
G. C. RY. Co.

as shall be just and consistent with this judgment. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House.

Lords' Journals, Dec. 18, 1923.

Solicitors for the appellant: *Pattinson & Brewer.*
Solicitor for the respondents: *Thomas Chew.*

[PRIVY COUNCIL.]

J. C.*
1923
Dec. 18.

AUCKLAND HARBOUR BOARD . . . APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

New Zealand—Constitutional Law—Payment out of Consolidated Fund—Absence of statutory Authority—Right of Crown to recover.

It is a principle of the British Constitution, inherited in the Constitution of New Zealand, that no money can be taken out of the consolidated fund into which the revenues of the State have been paid, except under a distinct authorization by Parliament itself; a payment made without that authority is illegal and ultra vires, and the money, if it can be traced, can be recovered by the Government.

An agreement made in 1913 provided (inter alia) that the Minister of Railways of New Zealand (representing the Crown) should pay to the appellants 7500*l.* when the appellants granted a lease to B. & Co. The making of the agreement had been authorized by an Act of 1912, which empowered the Minister, without further appropriation, to pay to the appellants out of the Public Works Fund such sum as might be payable in accordance with the agreement. Owing to an alteration in the scheme to which the agreement related, the Minister did not require the appellants to grant the lease, and it was not granted. Nevertheless the 7500*l.* was paid by the Minister of Railways to the appellants in 1914 out of a vote included in the Public Works Schedule to the Appropriation Act for the year, and the Controller and Auditor-General passed the sum as being so payable:—

Held, that as the lease had not been granted the payment of the

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* *Present:* VISCOUNT HALDANE, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR CHARLES DARLING.

7500*l.* was not authorized by the Act of 1912, and that it was recoverable by the Government and could be deducted from a larger sum admittedly due to the appellants.

Judgment of the Supreme Court affirmed.

APPEAL (No. 31 of 1922) from a judgment (1) of the Supreme Court of New Zealand (November 7, 1922).

The appeal arose out of a petition of right by which the appellants claimed from the Government of New Zealand 7500*l.*, which sum the Government had set off against an equal amount of a larger sum admittedly due by the Government to the appellants.

The facts appear from the judgment of the Judicial Committee, and more fully from the report of the proceedings in the Supreme Court at [1919] N. Z. L. R. 419.

The present appeal was first argued in November, 1922, and was ordered to be reargued.

1923. Nov. 28, 29, 30; Dec. 3. *Maugham K.C.* and *Stamp* for the appellants. The Supreme Court decided upon the view that the Minister of Railways had waived a condition in the agreement—namely, the granting of the lease—and that that waiver was ultra vires. There was, however, no waiver of a condition. The granting of the lease and the payment of the money were mutually dependent promises. The question is, was the payment made "in consideration of granting the lease," as the statute provides. The appellants being ready and willing to grant the lease were in equity in the position of having granted it. The Crown was therefore liable to pay the 7500*l.* when it was paid; the appellants are not concerned with the question of appropriation. If they are, they rely upon ss. 4 and 5 of the Appropriation Act, 1914, under which the payment purported to be made. Further, when a statute authorizes a contract for payment out of public money for a particular benefit to the Crown, it is not ultra vires of the department concerned to vary the details so as to secure the benefit in a more convenient form.

Clauson K.C., *Farwell K.C.* and *Mousley* for the respondents.

(1) [1919] N. Z. L. R. 419.

J. C.
1923
AUCKLAND HARBOUR BOARD v. THE KING.

The appellants have rightly accepted the burden of showing that the 7500*l.* was payable when they received it. When a subject receives public money without authority he becomes a debtor to the Crown to that extent: *Doddington's Case.* (1) Here the statute authorized payment only when the lease was granted, and the lease was not granted. On the true construction of the agreement the Minister had an option to require or not to require that it should be granted. [Reference was also made to *Commercial Cable Co.* v. *Newfoundland Government* (2) and *Churchward* v. *The Queen.* (3)]

Stamp replied.

Dec. 18. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The question which arises on this appeal is whether the Government had a right to deduct 7500*l.* from a sum of 25,094*l.* 5*s.* 8*d.* which was admittedly due to the appellants under a claim made under the Public Works Act, 1908, of New Zealand. It is conceded that the latter amount was payable as though awarded under the Act, as compensation for land which the appellants had reclaimed at Mechanics Bay, near Auckland, and which the Government had taken under statutory powers for railway purposes. By s. 126 of the Harbours Act of 1908 the amount of the compensation to which the appellants were entitled when, as here, the Government took the land of the appellants for railway purposes was not to exceed the amount which the appellants had actually laid out on the land, either for cost of reclamation or in permanently improving it. The sum of 25,094*l.* 5*s.* 8*d.* was ultimately, in the autumn of 1916, arrived at on this basis.

The Government withheld the 7500*l.* out of the total amount thus claimed, and the appellants presented a petition of right in respect of the sum deducted. This petition was dismissed on November 7, 1921, by the Supreme Court of New Zealand, the Chief Justice dissenting, and the appellants have brought this appeal.

(1) (1596) Cro. Eliz. 545. (2) [1916] 2 A. C. 610.
(3) (1865) L. R. 1 Q. B. 173.

J. C.
1923
AUCKLAND HARBOUR BOARD v. THE KING.

The appellants, the Auckland Harbour Board, which originally came into existence at an earlier date, were to be deemed under the provisions of the Harbours Act, 1908, to have been constituted under it. But the Board as originally constituted had previously, on December 24, 1897, made a lease to John Burns & Co., Ld., for a term of fifty years, at a rent of 200*l.* per annum, of a piece of land, forming part of the Board's endowment, marked "V" on a plan produced at the hearing. This land was close to Auckland Harbour. The Government took it on December 13, 1909, for railway purposes, and John Burns & Co. thereupon became entitled by statute to compensation. They claimed 21,894*l.* 10*s.* This claim was, however, agreed to be settled under the following circumstances. The Auckland Harbour Empowering Act was passed in 1912. On the preamble that it was desirable to empower the appellants to grant to John Burns & Co. a lease of such allotments of land (being other than that marked "V") then in course of reclamation by the appellants at Mechanics Bay, as should be agreed on by the Government, the appellants and John Burns & Co., and to authorize the payment to the appellants of such sum as might be agreed on in consideration of the appellants granting the lease, it was enacted by s. 7 that it should be lawful for the appellants to grant to John Burns & Co., without putting the same up to public auction or public tender, a lease of such allotments on the land then being reclaimed at Mechanics Bay, in accordance with s. 12 of the Auckland Harbour Empowering Act, 1911, as might be agreed on between the Minister of Railways (representing the Government), the appellant Board, and John Burns & Co., such lease to be on such terms and subject to such conditions as might be agreed upon between the parties, and to be in part compensation for the taking by the Government of the land then occupied by John Burns & Co. (marked "V" on the plan). Sub-s. 2 of s. 7 provided that it should be lawful for the Government to undertake for the Crown to pay to the appellant Board such sums as might be agreed upon in consideration of the Board granting the lease to Burns & Co. Sub-s. 3 provided that it

J. C. 1923 AUCKLAND HARBOUR BOARD v. THE KING.

should be lawful for the Minister of Railways (as representing the Government), and he was thereby empowered, without further appropriation than the Act itself, to pay to the appellant Board out of the Public Works Fund such sums as might be payable to the Board by the Crown in accordance with such agreement.

Prior to the passing of this Act of 1912, certain improvements to the water frontage and harbour of the City of Auckland had been determined on, and an agreement, dated November 3, 1911, had been entered into between the Government and the appellant Board. Under this the appellant Board had agreed to commence and complete the reclamation of an area of tidal land in close proximity to the parcel marked "V." The Government were to pay to the appellants the cost of doing this. It was provided that of the area to be so reclaimed the portion marked "Z" on the map should remain vested in the appellant Board as part of their endowment, the portion marked "Y" should be a public highway, and the portion marked "X" should be vested in the Government for railway purposes. It was also provided by this agreement that if at any time thereafter any part of the area marked "Z" was taken by the Crown, under powers conferred on it by the Harbours Act of 1908, the cost of reclamation by the Board should, for the purpose of assessing compensation under s. 126 of that Act, be deemed to be money actually laid out on the land by the Board, notwithstanding that such money had been repaid to the Board by the Crown under the agreement.

On September 2, 1913, another agreement, following on the Act of 1912, was entered into between the Minister of Railways, as representing the Crown, of the first part, the appellant Board of the second part, and John Burns & Co. of the third part. After reciting the lease to Burns & Co. of 1897, the taking of the land so leased in 1909 by the Government, the claim of Burns & Co. for compensation of 21,894*l.* 10*s.* and that the claim for compensation had been agreed to be settled on the terms and conditions of this new agreement, that was to say: "(*a*) that (at the request of

the Minister and for the consideration hereinafter mentioned) the Board shall grant to the company a lease upon the terms hereinafter set forth, of that piece of land, hereinafter described, being part of the land now being reclaimed by the Board at Mechanics Bay, in the said city (which was land closely adjacent to the piece marked 'V'); (*b*) that the Minister shall pay the sum of five thousand pounds to the company at the time mentioned in paragraph 2 hereof; (*c*) that the company shall have the right to occupy the land taken by the said Proclamation upon the terms and for the period hereinafter set forth"; the agreement (which was under seal) then witnessed: "that in pursuance of the premises and upon payment to the Board of the sum of seven thousand five hundred pounds at the time mentioned in paragraph 2 hereof, the Board shall grant to the company, and the company shall accept, a lease of a piece of land, being lots two to seven inclusive of the reclamation of Mechanics Bay," for forty-two years from the dates at which the lots were ready for occupation. The intention was defined to be that the company should have at least a ten years' extension of the term of their old lease, and the rent was to be 200*l*. The agreement went on to provide, in para. 2, as follows: "The Minister shall pay to the Board the said sum of seven thousand five hundred pounds when the Board grants and the Company accepts the said lease of the said reclaimed land, and the Minister shall pay to the company the said sum of five thousand pounds within one calendar month from the date the company gives up possession of its present premises."

It is convenient to pause at this point in the story in order to ascertain what the legal position was. Sect. 7 of the Act of 1912 had conferred on the appellant Board power to grant a lease to Burns & Co. if such a lease had been agreed upon between the Minister, the appellant Board and Burns & Co., and the Minister was given the power to pay to the Board such sum as might be agreed on as consideration for the Board granting the lease. He was authorized, without further appropriation by Parliament than the Act itself gave, to pay to the Board "out of the Public Works Fund" such sum as

J. C. 1923 AUCKLAND HARBOUR BOARD v. THE KING.

might be payable to the Board by the Crown in accordance with any agreement so made. Pausing here, their Lordships are unable to construe the statute as doing more than conferring on the Minister the power to enter into an agreement, and, but only if and when a lease was granted by the Board in accordance with it, to pay an amount to be settled by negotiation as the consideration for it, out of a fund to be provided by Parliament. The whole matter remains so far an option to the Minister. It is this option which the subsequent agreement of September 2, 1913, further defines. An arrangement had been come to between the Minister and Burns & Co. by which their claim for 21,894*l.* 10*s.* was to be satisfied by the grant of the new lease by the Board, if requested by the Minister to grant it, and the payment to Burns & Co. of 5000*l.* If the Minister asked the Board to grant the lease and paid them 7500*l.* they were to grant it, but this sum was only made payable when the Board actually granted the lease and the company accepted it. The character of the transaction, which was optional for the Minister under the Act, accordingly remained similarly optional under the terms of the agreement.

An interval of nearly a year after the agreement elapsed without action being taken, and then a new suggestion was made. The secretary of the appellant Board wrote to a Government official, the general manager of the State railways, on August 25, 1914, saying that in the course of a conversation between the chairman of his Board and the general manager it was understood that there was a possibility of the Government resuming the area marked "Z," which included the lots which were to be leased to Burns & Co. The secretary asked the general manager whether he desired the appellant Board to refrain from proceeding in terms of the agreement, and, if so, on what conditions. On October 27 following the secretary of the Board again wrote saying that the new lots were ready for occupation, and that the Board was in a position to grant the lease to Burns & Co. and had included the 7500*l.* in a statement, which he enclosed, of the amount due to the appellants from the Government.

This, he added, was in accordance with the understanding already referred to between the chairman of the Board and the general manager. The Railway Department, however, replied in a letter stating that the 7500*l.* had been deducted from the amount shown by the statement, pending consideration. The manager answered this letter by insisting that, as the Board was in a position to grant the lease, and that it had only not been issued because of the request of the general manager, the 7500*l.* was payable. In the end, on December 3, 1914, the district engineer of the Railway Department wrote to the secretary that a voucher for the 7500*l.* had been passed for payment. Subsequently, however, the general manager wrote to the appellants that he had been advised by the Solicitor-General that the 7500*l.* paid over to the appellants, in accordance with the voucher passed for payment, had been an illegal payment of public money, and that he had therefore deducted the amount from the total claim made by the appellant Board for reclamations of 25,103*l.* 13*s.* 5*d.*

From what their Lordships have already stated as their view of the transaction, it is apparent that the 7500*l.* never became payable. The option was never exercised under which Burns & Co. were to be declared by the Government entitled to the lease. In point of fact, the Government shortly after made a different settlement of the claim of Burns & Co., under which the latter did not get the land which was to have been included in it. For in August, 1915, acting under their statutory powers, the Government resumed a part of the land belonging to the appellant Board which included what Burns & Co. were to have had. The appellant Board were compensated for this resumption of the entire land in the manner and on the footing directed by the Harbours Act, 1908, and it thereupon became impossible for them to make a lease to Burns & Co. of land to which they had no longer a title, and for the whole of which they had been paid by the Government. An independent settlement was made by the Government with Burns & Co., who received, in addition to the 5000*l.* mentioned in the agreement of September 2, 1913, a further sum of 14,500*l.*, and also a tenancy of certain

J. C. 1923 — AUCKLAND HARBOUR BOARD v. THE KING.

premises for two years free of rent, in full satisfaction of all the company's claims. As already stated, the appellants were compensated for the whole of the land in question, inasmuch as they had not to grant any lease, of the part at one time contemplated, to Burns & Co.

Their Lordships are of opinion that under these circumstances the appellants never became entitled under any contractual title to payment of the 7500*l.*

But it was argued that, as the voucher for this amount had been passed, and the money paid, the transaction could not now be reopened. It was said, and it appears to have been the fact, that the Controller and Auditor-General subsequently passed the sum handed over as having been payable out of public moneys appropriated in general terms for railway services by the New Zealand Parliament in 1914. But this is not a sufficient answer to the contention that the payment was not authorized. Sect. 7 of the Act of 1912 provides that the sum which was agreed on at 7500*l.* was to be payable to the appellants only on a condition—namely, on the granting of the lease, which was to be the consideration. The provision which Parliament thus made was to be in itself a sufficient appropriation, but only operative if the condition was actually satisfied. Their Lordships have not been referred to any appropriation or other Act which altered these terms. If, as must therefore be taken to be the case, it remained operative, the authority given by Parliament is merely the conditional appropriation provided in s. 7, for a condition which was not fulfilled. The payment was accordingly an illegal one, which no merely executive ratification, even with the concurrence of the Controller and Auditor-General, could divest of its illegal character. For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone

by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced.

Their Lordships are unable to agree with the reasoning of the Chief Justice to the effect that the money had not really to be paid under the authority of s. 7 of the Act of 1912. Unless this section had been repealed, its terms were imperative when the claim of the appellant Board was entertained. They are unable to agree with the Chief Justice in the view that there is evidence of any later appropriation made by Parliament which dispensed with the condition imposed in 1912. If so to invoke analogies of what might be held in a question between subject and subject is hardly relevant. They find themselves more at one with the very different view of the majority of the learned judges in the Supreme Court, especially with the opinions expressed towards the end of their respective judgments by Chapman and Hosking JJ.

For these reasons they will humbly advise His Majesty that this appeal should be dismissed, with costs.

Solicitors for appellants: *Mackrell, Maton, Godlee & Quincey.*

Solicitors for respondent: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

Applied. CANADIAN FED. OF AGRICULTURE *v.* ATT.-GEN. FOR QUEBEC [1951] A. C. 179

J. C.* 1924 Jan. 24.

ATTORNEY-GENERAL FOR ONTARIO Appellant;

AND

RECIPROCAL INSURERS and Others . Respondents.

ATTORNEY-GENERAL FOR CANADA . Intervener.

[AND CONNECTED APPEALS.]

Canada—Legislative Authority—Insurance—Criminal Law—Reciprocal Insurance Act, 1922 (12 & 13 *Geo.* 5, *Ont.*, *c.* 62)—*Criminal Code* (*R.S. Can.*, 1906), *s.* 508*c*—*Insurance Act* (7 & 8 *Geo.* 5, *c.* 29, *Dom.*), *ss.* 11, 12—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92.

The Parliament of Canada cannot, by purporting to create penal sections under s. 91, head 27, of the British North America Act, 1867, appropriate to itself exclusively a field of jurisdiction in which, apart from that procedure, it could exert no legal authority; if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.

The Reciprocal Insurance Act, 1922, of Ontario authorized any person to exchange, through the medium of an attorney, with persons, whether in Ontario or elsewhere, reciprocal contracts of insurance, subject to provisions as to licences and other conditions; and it was provided that actions in respect of such contracts might be maintained in the Courts of the Province. A Dominion Act of 1917 inserted in the Criminal Code (R.S. Can. 1906, c. 146), s. 508c, by which it was made an indictable offence for any person to solicit or accept any insurance risk except on behalf of a company or association licensed under the Insurance Act, 1917, of Canada.

In answer to questions referred by the Lieutenant-Governor of Ontario to the Appellate Division:—

Held, (1.) that the Act of 1922 was intra vires the Province, since (*a*) its provisions were capable of receiving a meaning according to which, whether enabling or prohibitive, they applied only to persons and acts within the territorial jurisdiction of the Province, and (*b*), although it might incidentally affect aliens and Dominion companies, it did not deal with them as such, but was an Act dealing with contracts of insurance.

(2.) That the making and carrying out of contracts licensed pursuant to the Act were not rendered illegal, or otherwise affected, by s. 508c of the Criminal Code; that section was invalid, since, in substance

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* *Present:* Viscount Haldane, Lord Buckmaster, Lord Shaw, Lord Sumner, and Mr. Justice Duff.

though not in form, it was in regulation of contracts of insurance, subjects not within the legislative competence of the Dominion.

(3.) That the answers under (1.) and (2.) would be the same if any of the persons subscribing to a reciprocal insurance contract was (*a*) a British subject not resident in Canada immigrating into Canada, or (*b*) an alien. In so answering this question no opinion was expressed as to the competence of the Dominion Legislature to enact ss. 11 and 12, sub-s. 1, of the Insurance Act, 1917, whereby restrictions were placed upon aliens and British companies in the matter of carrying on insurance business in Canada ; but s. 12, sub-s. 2, was held to be invalid in relation to the subject of immigration.

Attorney-General for Alberta v. *Attorney-General for Canada* [1916] 1 A.C. 588 and *In re Board of Commerce Act* [1922] 1 A.C. 191 followed.

Judgment of the Appellate Division varied.

CONSOLIDATED APPEAL (No. 40 of 1923) by special leave from a judgment (1) of the Supreme Court of Ontario, Appellate Division (December 29, 1922), upon a reference by the Lieutenant-Governor of Ontario, pursuant to c. 85 of R.S. Ont. 1914, and upon cases reserved for the opinion of that Court by a police magistrate.

The main appeal was from the judgment of the Appellate Division in answer to three questions referred as above stated, relative to the validity of the Reciprocal Insurance Act, 1922 (12 & 13 Geo. 5, Ont.), and whether the making and carrying out of reciprocal insurance contracts licensed under that Act were rendered illegal by s. 508c added to the Criminal Code of Canada by 7 & 8 Geo. 5, c. 29 (Dom.). The questions are set out in full at the beginning of the judgment of the Judicial Committee.

The appellants in the two connected appeals, Craigon and Otte, were each convicted by a police magistrate of the City of Toronto, Ontario, with indictable offences under s. 508c of the Criminal Code—namely, soliciting insurance risks, and carrying on the business of insurance, on behalf of persons acting under a reciprocal insurance agreement without being licensed as required by the section. Craigon was a British subject and Otte an alien, both being resident in Toronto. The police magistrate stated cases for the opinion of the Court under s. 1014 of the Criminal Code of Canada, reserving in

(1) 53 Ont. L. R. 195.

J. C. 1924 ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS.

each case the following question : " Are s. 508c of the Criminal Code and ss. 4 and 11 of the Insurance Act, 1917, or any of them, in so far as they purport to render illegal the acts complained of in the above charge intra vires of the Parliament of Canada ? "

The provisions of the material enactments appear from the judgment of the Judicial Committee.

The reference and the cases stated were heard together by the Appellate Division, consisting of the Chief Justice of Ontario with Maclaren, Magee, Masten and Ferguson JJ. Judgments were delivered on December 29, 1922, and are reported at 53 Ont. L. R. 195.

On the first question the Chief Justice, Maclaren J., and Magee J., were of opinion that the Act of 1922 was valid save so far as it purported to authorize the making of contracts outside Ontario, or to insure property outside Ontario, and save so far as it authorized aliens to make such contracts. Masten and Ferguson JJ. answered the question in the negative.

The second question was answered by the Chief Justice and Maclaren J. in the affirmative so far as it related to companies and persons prohibited by ss. 11 and 12 of the Insurance Act, 1917, of Canada. Masten and Ferguson JJ. answered it in the affirmative without qualification.

All the judges considered that an answer to the third question was not necessary in view of their answers to the other two questions.

The question submitted by the cases stated was answered by all the learned judges in the affirmative.

1923. July 17, 19, 20. *Hon. Geoffrey Lawrence* and *Evan Gray* for the appellant, the Attorney-General for Ontario.

F. W. Wegenast and *T. Moss* for the respondent Reciprocal Insurers, and for Craigon and Otte, appellants in the connected appeals.

A. W. Anglin K.C. for the Canadian Underwriters' Association, respondents.

Newcombe K.C. for the Attorney-General for Canada,

intervener, and for the Crown, respondent in the connected appeals.

[Reference was made to the provisions of the Reciprocal Insurance Act, 1922 (12 & 13 Geo. 5, c. 62, Ont.) generally, to the Insurance Act, 1917 (7 & 8 Geo. 5, c. 29), ss. 4, 11, 12, and other sections, and to *Attorney-General for Canada* v. *Attorney-General for Alberta* (1); *Attorney-General for Ontario* v. *Attorney-General for Canada* (2); *In re Board of Commerce Act* (3); *John Deere Plow Co.* v. *Wharton* (4); *Union Colliery Co.* v. *Bryden* (5); and *Cunningham* v. *Tomey Homma.* (6)

Jan. 25. The judgment of their Lordships was delivered by

MR. JUSTICE DUFF. Availing himself of the provisions of the Provincial statute, c. 85 of R.S. Ont., 1914, the Lieutenant-Governor of Ontario on May 10, 1922, referred to the Appellate Division of the Supreme Court of Ontario three separate questions in the following terms:—

"Question One.—Is it within the legislative competence of the Legislature of the Province of Ontario to regulate or license the making of reciprocal contracts by such legislation as that embodied in the Reciprocal Insurance Act, 1922?

"Question Two.—Would the making or carrying out of reciprocal insurance contracts licensed pursuant to the Reciprocal Insurance Act, 1922, be rendered illegal or otherwise affected by the provisions of ss. 508C and 508D of the Criminal Code as enacted by c. 26 of the Statutes of Canada 7 & 8 Geo. 5, in the absence of a licence from the Minister of Finance issued pursuant to s. 4 of the Insurance Act of Canada 7 & 8 Geo. 5, c. 29?

"Question Three.—Would the answers to questions one or two be affected, and if so how, if one or more of the persons subscribing to such reciprocal insurance contracts is: (A) A British subject not resident in Canada immigrating into Canada? (B) An alien?"

The two Dominion statutes mentioned in the second of these

(1) [1916] 1 A. C. 588.
(2) [1916] 1 A. C. 598.
(3) [1922] 1 A. C. 191, 198.
(4) [1915] A. C. 330, 339, 340.
(5) [1899] A. C. 580.
(6) [1903] A. C. 151.

J. C. 1924 ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS.

queries were passed on the same day, September 20, 1917 (7 & 8 Geo. 5, c. 29), one entitled the Insurance Act, 1917, and the other (7 & 8 Geo. 5, c. 26), entitled an Act to Amend the Criminal Code respecting insurance. The question whether the first section of the last-mentioned of them, a section professing to bring into force an amendment of the Criminal Code designated as s. 508C, was competently enacted, is the most important question with which their Lordships are concerned on this appeal, and it will be convenient to discuss that question first. It was answered in the affirmative by the Appellate Division.

These two statutes, which are complementary parts of a single legislative plan, are admittedly an attempt to produce by a different legislative procedure the results aimed at by the authors of the Insurance Act of 1910, which in *Attorney-General for Canada* v. *Attorney-General for Alberta* (1) was pronounced ultra vires of the Dominion Parliament.

The Insurance Act of 1917 empowers the Minister of Finance to grant licences to companies, authorizing them to carry on in Canada the business of insurance, except marine insurance, subject to the provisions of the statute and to the terms of the licence. Any company, other than a company already incorporated under the authority of the Dominion Parliament, when licensed under the statute, becomes, and is deemed to be, a company incorporated under the laws of Canada. The Minister is also authorized to grant licences to associations of individuals formed upon the plan known as Lloyd's and to associations formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as inter-insurance; and in such cases all the provisions and requirements of the statute regulating the business of licensed companies are deemed, so far as applicable, to be terms and conditions of the licence. No provision is made by the statute for licensing individuals or for licensing firms or unincorporated associations other than those falling within the two classes just mentioned.

The enactments of the statute include provisions touching

(1) [1916] 1 A. C. 588.

the requirements with which applicants for licences must comply, the terms of licences, the conditions of their cancellation and suspension, and a comprehensive system of regulations controlling licensees in relation to the form and terms of contracts of insurance and the business of insurance generally, including (inter alia) regulations governing the salaries, allowances and commissions of directors and agents, and the investment of the funds of such companies; to all of which provisions, in so far as applicable, unincorporated associations of the two classes above mentioned, that have received licences, are subject.

In the Insurance Act itself there is no enactment of general application requiring persons carrying on the business of insurance to become licensed under it. Provisions of limited application upon the subject are found in ss. 11 and 12. By s. 11 it is declared to be unlawful for any Dominion company or for any alien, whether a natural person or foreign company, to solicit or accept any risk, to issue or deliver any receipt or policy of insurance, to carry on any business of insurance or to do any of a number of other acts therein enumerated in relation to any such business unless licensed under the Act; and by s. 12 it is declared to be unlawful for any British company or for any British subject not resident in Canada to immigrate into Canada for the purpose of opening or establishing any office or agency for the transaction of any business of or relating to insurance, or doing any of the acts declared to be unlawful by s. 11. Penalties are imposed, for example by ss. 84 and 187, in respect of infringements of the Act.

Broadly speaking, therefore, under the Insurance Act any company, whether British, foreign or Canadian, incorporated for the purpose of carrying on the business of insurance, and any unincorporated association falling within either of the two classes mentioned, may become licensed upon observing the requirements of the Act, and as licensees such company thereupon becomes subject to the provisions of the Act, which, as regards such licensees, receive obligatory force by virtue of the penal clauses already referred to and of the

J. C. 1924

ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS.

liability of licences to cancellation for non-observance of statutory requirements. But the provisions of the statute contain nothing making it compulsory for any private individual or any unincorporated firm or association to become licensed as a condition of lawfully carrying on or transacting any business of insurance.

It is obvious that, in the absence of some such compulsory enactment, directed against such individuals and unincorporated bodies, the scheme of regulation embodied in the Insurance Act could only be incompletely effectual, and accordingly the authors of the legislation resorted to the expedient of bringing the necessary prohibitions and penalties into force in the form of an amendment to the Criminal Code. That amendment, which is designated as s. 508c of the Criminal Code, is in the following words:

"(1.) Everyone shall be guilty of an indictable offence who, within Canada, except on behalf or as agent for a company thereunto duly licensed by the Minister of Finance or on behalf of or as agent for or as a member of an association of individuals formed upon the plan known as Lloyd's or of an association of persons formed for the purpose of inter-insurance and so licensed solicits or accepts any insurance risk, or issues or delivers any interim receipt or policy of insurance, or grants in consideration of any premium or payment any annuity on a life or lives, or collects or receives any premium for insurance, or carries on any business of insurance or inspects any risk, or adjusts any loss, or prosecutes or maintains any suit, action or proceeding, or files any claim in insolvency relating to such business, or receives directly or indirectly any remuneration for doing any of the aforesaid acts.

(2.) Anyone convicted of any such offence shall for a first offence be liable to a penalty of not more than fifty dollars or less than twenty dollars, and in default of payment, to imprisonment with or without hard labour for a term of not more than three months or less than one month, and for a second or any subsequent offence to a penalty of not more than one hundred dollars or less than fifty dollars, and, in

addition thereto to imprisonment with hard labour for a period of not more than six months or less than three months.

(3.) All information or complaints for any of the aforesaid offences shall be laid or made within one year after the commission of the offence.

(4.) One-half of any pecuniary penalty mentioned in this section shall, when recovered, belong to His Majesty, and the other half thereof to the informer.

Provided that nothing in this section contained shall be deemed to prohibit or affect or to impose any penalty for doing any of the acts in this section described : (A) By or on behalf of a company incorporated under the laws of any Province of Canada for the purpose of carrying on the business of insurance. (B) By or on behalf of any society or association of persons thereunto specially authorized by the Minister of Finance or the Treasury Board. (C) In respect of any policy or risk of life insurance issued or undertaken on or before the thirtieth day of March, one thousand eight hundred and seventy-eight, by or on behalf of any company which has not since the last-mentioned date received a licence from the Minister of Finance. (D) In respect of any policy of life insurance issued by an unlicensed company to a person not resident in Canada at the time of the issue of such policy. (E) In respect of the insurance of property situated in Canada with any British or foreign unlicensed insurance company or underwriters, or with persons who reciprocally insure for protection and not for profit, or the inspection of the property so insured, or the adjustment of any loss incurred in respect thereof if the insurance is effected outside of Canada without any solicitations whatsoever directly or indirectly on the part of the company, underwriters or persons by which or by whom the insurance is made. (F) Solely in respect of marine or inland marine insurance. (G) In respect of any contract entered into or any certificate of membership or policy of insurance issued, before the twentieth day of July, one thousand eight hundred and eighty-five by any assessment life insurance company."

It will be observed that by force of para. (A) of the proviso,

J. C. 1924 ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS.

Provincial incorporated companies are under no disability. Prohibited acts, though criminal offences when done by an individual on behalf of himself or of an unlicensed unincorporated association or on behalf of an unlicensed company other than a Provincial company, are treated as innocent when done on behalf of a Provincial company, or (in virtue of para. (B)) when done on behalf of a society or association under the special authority of the Minister of Finance or of the Treasury Board. Such acts, by force of para. (F), are likewise innocent when done solely in respect of marine insurance. Subject to these exceptions (the remaining paragraphs of the proviso are of no relevancy) the effect of the enactment, briefly summarized, is that anybody who does, in Canada, any of the acts enumerated, is guilty of an indictable offence unless he is acting on behalf of a company licensed under the Insurance Act or on behalf of or as a member of an association so licensed; and the necessary consequence is that, subject, of course, to the same exceptions, if the enactment be legally operative, contracts of insurance, if lawfully effected, and any business of insurance, if lawfully transacted, are brought, after the passing of the Act, under the dominion of the system of regulations governing licensees under the Insurance Act; and to that extent withdrawn from Provincial control.

In *Attorney-General for Canada* v. *Attorney-General for Alberta* (1), it was decided by this Board that it was not competent to the Dominion to regulate generally the business of insurance in such a way as to interfere with the exercise of civil rights in the Provinces.

The provisions relating to licences in the Insurance Act of 1910, which by this judgment was declared to be ultra vires, and the regulations governing licences under the Act and app icable to contracts and to the business of insurance, did not, in any respect presently material, substantially differ from those now found in the legislation of 1917; but the provisions of the statute of 1910 derived their coercive force from penalties created by the Insurance Act itself.

The distinction between the legislation of 1910 and that of

(1) [1916] 1 A. C. 588.

1917, upon which the major contention of the Dominion is founded, consists in the fact that s. 508c is enacted in the form of an amendment to the statutory criminal law, and purports only to create offences which are declared to be indictable, and to ordain penalties for such offences. The question now to be decided is whether, in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the "true nature and character" of the enactment: *Citizens' Insurance Co.* v. *Parsons* (1); its "pith and substance": *Union Colliery Co.* v. *Bryden* (2); and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be "scrutinised in its entirety": *Great West Saddlery Co.* v. *The King.* (3) Of course, where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing. Upon this principle the Board proceeded in 1878, in *Attorney-General for Quebec* v. *Queen Insurance Co.* (4), where a statute of Quebec (39 Vict. c. 7), which took the form of a licensing Act, enacted under the authority of s. 92, head 9, of the British North America Act, was held to be in its true character a Stamp Act and an attempt to impose a tax which was an indirect tax, in contravention of the limitation to which the Provincial powers of taxation are subject under the second

(1) (1881) 7 App. Cas. 96.
(2) [1899] A. C. 580.
(3) [1921] 2 A. C. 91, 117.
(4) (1878) 3 App. Cas. 1090.

J. C. 1924 ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS.

head of that section. The principle is recognized in *Russell* v. *The Queen* (1), and in *Citizens' Insurance Co.* v. *Parsons* (2), and in 1899, conformably to this doctrine, it was held, in the well-known case of *Union Colliery Co.* v. *Bryden* (3), that a statutory regulation, professedly passed for governing the working of coal mines, which admittedly "might be regarded as establishing a regulation applicable" to the working of such mines, and which, "if that were an exclusive description of the substance of it," was "within the competency of the Provincial Legislature by virtue either of s. 92, No. 10, or s. 92, No. 13," must be classed, its "true character," its "pith and substance" being ascertained, as legislation in relation to the subject of "aliens and naturalisation," a subject exclusively within the Dominion sphere of action. The general doctrine was later applied in *John Deere Plow Co.* v. *Wharton* (4), and again in *Great West Saddlery Co.* v. *The King.* (5)

A judgment of the Supreme Court of the United States delivered in 1918 in *Hammer* v. *Dagenhat* (6) illustrates the operation of the principle. By the Constitution of the United States the regulation of commerce between the States is committed to Congress, and this authority, it was decided in a series of decisions of the Supreme Court, includes the power to prohibit the transmission, through the channels of inter-State commerce, of any particular class of articles of commerce. The statute of Congress, which the Supreme Court had to consider in the case mentioned, prohibited "the transportation in inter-State commerce" of manufactured goods the product of a factory in which within thirty days prior to their removal therefrom children of certain specified ages had been employed or permitted to work. The authority to enact this statute was rested upon the grounds that the power of Congress in relation to inter-State commerce is an unqualified power, including, as already mentioned, the authority to prohibit the transport of any

(1) (1882) 7 App. Cas. 829.
(2) 7 App. Cas. 96.
(3) [1899] A. C. 580.
(4) [1915] A. C. 330.
(5) [1921] 2 A. C. 91, 117.
(6) (1918) 247 U. S. 251.

articles of commerce of any description whatever in inter-State commerce, and that, the legislation impugned, being ex facie within the terms of the power, it was not competent to any judicial tribunal to inquire into the purpose, or the ultimate or collateral effects, of the enactment. In the course of the judgment delivered by Day J., on behalf of the majority of the Court, holding that the statute could not be supported as legislation regulating inter-State commerce within the true intendment of "the commerce clause," it is said: "A statute must be judged by its natural and reasonable effect. . . . . We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This Court has no more important function than that which devolves upon it, the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution. In our view the necessary effect of this act is, by means of a prohibition against the movement in inter-State commerce of ordinary commercial commodities, to regulate the hours of labour of children in factories and mines within the States, a purely State authority. . . . . The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in inter-State commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of Government be practically destroyed."

It is not seriously disputed that the purpose and effect of the amendment in question are to give compulsory force to the regulative measures of the Insurance Act, and their Lordships think it not open to controversy that in purpose and effect s. 508c is a measure regulating the exercise of civil rights. But, on behalf of the Dominion, it is argued that, although such be the true character of the legislation, the

J. C. 1924 ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS.

jurisdiction of Parliament, in relation to the criminal law, is unlimited, in the sense, that in execution of its powers over that subject matter, the Dominion has authority to declare any act a crime, either in itself or by reference to the manner or the conditions in which the act is done, and consequently that s. 508C, being by its terms limited to the creation of criminal offences, falls within the jurisdiction of the Dominion.

The power which this argument attributes to the Dominion is, of course, a far-reaching one. Indeed, the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion. Obviously the principle contended for ascribes to the Dominion the power, in execution of its authority under s. 91, head 27, to promulgate and to enforce regulations controlling such matters as, for example, the solemnization of marriage, the practice of the learned professions and other occupations, municipal institutions, the operation of local works and undertakings, the incorporation of companies with exclusively Provincial objects—and superseding Provincial authority in relation thereto. Indeed, it would be difficult to assign limits to the measure in which, by a procedure strictly analogous to that followed in this instance, the Dominion might dictate the working of Provincial institutions, and circumscribe or supersede the legislative and administrative authority of the Provinces.

Such a procedure cannot, their Lordships think, be justified, consistently with the governing principles of the Canadian Constitution, as enunciated and established by the judgments of this Board. The language of ss. 91 and 92 (which establish "interlacing and independent legislative authorities," *Great West Saddlery Co.* v. *The King* (1)) being popular rather than scientific, the necessity was recognized, at an early date, of

(1) [1921] 2 A. C. 91.

construing the words describing a particular subject matter by reference to the other parts of both sections. As Sir Montague Smith observed, in a well-known passage in the judgment in *Citizens' Insurance Co.* v. *Parsons* (1), "The two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other." The scope of the powers received by the Dominion under head 27, s. 91, is not to be ascertained by obliterating the context, in which the words are placed, in disregard of this rule. It will be sufficient to refer briefly to one or two of the cases which illustrate this.

Her Majesty in Council, in 1885, referred to the Judicial Committee the question of the competence of the Canadian Parliament to pass a statute of 1883 known as the Liquor Licence Act. That Act, by its preamble, recited that it was desirable to regulate the traffic in the sale of intoxicating liquors, and that it was expedient that provision should be made in regard thereto, "for the better preservation of peace and order." The statute provided for a licensing system, and prohibited, among other things, the sale of liquor by unlicensed persons, and imposed penalties by way of fine and imprisonment, including, as the penalty for a second or subsequent offence, imprisonment at hard labour in the common jail. In the course of the argument the view was advanced that the statute could be regarded as an exercise of the jurisdiction of the Dominion in relation to the criminal law; nevertheless the statute was held to be ultra vires as a whole. The Insurance Act of 1910, s. 70, imposed penalties still more stringent upon persons infringing the prohibition of s. 4 against engaging in the business of insurance without first obtaining a licence under the Act. The penal provisions of the statute were appealed to, on the argument before this Board in *Attorney-General for Alberta* v. *Attorney-General for Canada* (2), as imparting to it the character of criminal law within the meaning of s. 91: the contention was rejected. Again, in 1922, the question of the authority of the Parliament of Canada to enact certain sections of the Combines

(1) 7 App. Cas. 96, 109. (2) [1916] 1 A. C. 588.

J. C. 1924 ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS.

and Fair Prices Act (9 & 10 Geo. 5, c. 45) came before the Board in *In re Board of Commerce Act* (1), and the Board had to consider whether s. 22 of the Act had the effect of bringing the provisions in question under the denomination of criminal law. That section expressly declared that contravention of the Act should be an indictable offence, punishable, upon indictment or summary conviction, by fine or imprisonment, or both; and their Lordships, by their judgment, laid it down that it was not competent to the Dominion Parliament "to interfere with a class of subject committed exclusively to the Provincial Legislatures and then to justify this by enacting ancillary provisions designated as new phases of Dominion criminal law, which require a title to so interfere as the basis of their application." Indeed, on any other hypothesis, the greater part of the judgment in *Russell* v. *The Queen* (2) would be quite beside the question then before the Board, a remark which would equally apply to the elaborate judgment delivered by Lord Watson on the local option reference, reported under the title *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3), and to the lengthy arguments to which the Board listened on the hearing of that appeal. In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid. And indeed, to hold otherwise would be incompatible with an essential principle of the Confederation scheme, the object of which, as Lord Watson said in *Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (4), was "not to weld the Provinces into one or to subordinate the Provincial

(1) [1922] 1 A. C. 191.
(2) 7 App. Cas. 829.
(3) [1896] A. C. 348.
(4) [1892] A. C. 437, 441.

Governments to a central authority." "Within the spheres allotted to them by the Act the Dominion and the Provinces are," as Lord Haldane said in *Great West Saddlery Co.* v. *The King* (1), "rendered in general principle co-ordinate Governments."

Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces. It is one thing, for example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways.

Their Lordships now turn to the examination of the question arising on the first of the interrogatories submitted to the Appellate Division, which concerns the validity of legislation of the character of the Ontario Act (12 & 13 Geo. 5, c. 62) therein mentioned, which by its terms is only to come into force on proclamation to that effect by the Lieutenant-Governor in Council. This Act, as its name imports, is a statute dealing with reciprocal contracts of insurance. The practice of forming groups, for the purpose of exchanging such contracts of insurance, appears to have originated in the United States and to prevail widely there and in Canada. Such groups, described as exchanges in the Act, are usually composed of persons having some common interest, as owners of a particular class of property, for example, or dealers in the same kinds of commodities. The contracts are effected, and the business incidental to them transacted, through the agency of an attorney, who is empowered by each subscriber

(1) [1921] 2 A. C. 91, 100.

J. C. 1924 ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS.

individually to act for him in making such contracts with other members of the exchange. The exchange, as a whole, undertakes no obligation, the attorney, who receives a commission for his services, in every case acting for the subscriber as an individual, and the obligation of the subscriber being his own individual obligation.

At the date on which the statute of 1922 was assented to, there were, by virtue of the Ontario Insurance Act (R.S. Ont., c. 183), certain prohibitions in force in Ontario which are qualified by that statute. By s. 98 of the Ontario Insurance Act, the transacting or undertaking of insurance (other than guarantee insurance by certain companies), except by a corporation duly registered under s. 66 of that Act, was forbidden, and a penalty was imposed on every person contravening this prohibition. Sects. 3 and 4 of the statute of 1922 limit the scope of the prohibition by enacting, first, that it shall be lawful for any person to exchange with other persons, in Ontario or elsewhere, reciprocal contracts of indemnity or inter-insurance, and that no person shall be deemed to be an insurer, within the meaning of the Ontario Insurance Act, by reason of exchanging such contracts with other persons under the provisions of the Act. The making of reciprocal contracts of indemnity or inter-insurance, through an attorney as intermediary, is expressly sanctioned by s. 5. And, by ss. 6 and 7, the Superintendent of Insurance is empowered, upon fulfilment of specified conditions, to grant licences to exchanges, each of which is required to maintain a reserve of specified amount in the hands of its attorney. By s. 14 any one is forbidden to act as an attorney in the exchange of such contracts, except under the sanction of a licence issued under the Act. And, by s. 15, authority is given for the cancellation or revocation of such licences, for non-fulfilment of the statutory conditions.

It is alleged, upon two grounds, that this statute is illegal. It is said, first, that it is extra-territorial in its operation; and, secondly, that it assumes to deal with subjects not assigned to the Provinces, the subject of aliens and that of Dominion companies. Their Lordships find nothing in the

language of the statute which necessarily gives to its enactments an extra-territorial effect. The enabling provisions of ss. 3 and 4 appear to be designed to exempt the transactions to which they relate from the above-mentioned prohibitions of the Ontario Insurance Act, and the terms of the statute as a whole are, in their Lordships' judgment, capable of receiving a meaning according to which its provisions, whether enabling or prohibitive, apply only to persons and acts within the territorial jurisdiction of the Province. In their opinion it ought to be interpreted in consonance with the presumption which imputes to the Legislature an intention of limiting the direct operation of its enactments to such persons and acts.

As to the second ground of attack, it is only necessary to observe that contracts of insurance form the subject of the statute, a subject peculiarly within the sphere of Provincial control. It is true that its provisions may incidentally affect aliens and Dominion companies who are, or may wish to become, subscribers to an inter-insurance exchange; it is nevertheless not a statute in relation to aliens, as such, or Dominion companies as such. It is unnecessary and undesirable to attempt to say how far, if at all, the Dominion in execution of its powers in relation to the subjects of aliens and Dominion companies may dictate the rules governing contracts of insurance, to which an alien or a Dominion company may be a party. Nothing in s. 91 of the British North America Act, in itself, removes either aliens or Dominion companies from the circle of action which the Act has traced out for the Provinces. Provincial statutes of general operation on the subject of civil rights prima facie affect them. It may be assumed that legislation touching the rights and disabilities of aliens or Dominion companies might be validly enacted by the Dominion in some respects conflicting with the Ontario statute, and that in such cases the provisions of the Ontario statute, where inconsistent with the Dominion law, would to that extent become legally ineffective; but this, as their Lordships have before observed, is no ground for holding that the Provincial legislation, relating as it does

J. C. 1924 ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS.

to a subject matter within the authority of the Province, is wholly illegal or inoperative: *McColl* v. *Canadian Pacific Ry. Co.* (1)

It follows from what has been said that the answer to the first question is in the affirmative, and the answer to the second, in the negative. The provisions of s. 508D have not been specifically referred to, since they do not in their terms purport to prohibit, even upon conditions, the making of the contracts described in the question, and the reference to that section, their Lordships were informed on the argument, was inserted in the question by mistake.

In view of the terms of the third question it is necessary to notice a contention of the respondents that s. 508C can receive a limited effect as applying to aliens within the meaning of s. 11 (*b*) of the Insurance Act, 1917, and to companies and natural persons not aliens immigrating into Canada within the meaning of s. 12, and a parallel contention as to the effect of ss. 11 and 12.

The enactment in question being in substance, notwithstanding its form, an enactment in regulation of contracts of insurance and the business of insurance, subjects not within the legislative sphere of the Dominion, and, subject to the proviso which is not here material, being general in its terms, is in their Lordships' opinion invalid in its entirety. Assuming that it would be competent to the Dominion Parliament, under its jurisdiction over the subject of aliens, to pass legislation expressed in similar terms, but limited in its operation to aliens, their Lordships think it too clear for discussion that s. 508C is not an enactment on the subject of aliens (just as the Ontario statute of 1922 is not an enactment on that subject); and that the language of the clause in question cannot be so read as to effect by construction such a limitation of its scope. Such a result could only be accomplished by introducing qualifying phrases, indeed, by rewriting the clause and transforming it into one to which the Legislature has not given its assent.

It follows that the third question must be answered in the

(1) [1923] A. C. 126, 135.

negative, but with this qualification, that, in so answering it their Lordships do not express any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact ss. 11 and 12, sub-s. 1, of the Insurance Act. This, although referred to on the argument before their Lordships' Board, was not fully discussed, and since it is not directly raised by the question submitted, their Lordships, as they then intimated, consider it inadvisable to express any opinion upon it. Their Lordships think it sufficient to recall the observation of Lord Haldane, in delivering the judgment of the Board in *Attorney-General for Canada* v. *Attorney-General for Alberta* (1), to the effect that legislation, if properly framed, requiring aliens, whether natural persons or foreign companies, to become licensed, as a condition of carrying on the business of insurance in Canada, might be competently enacted by Parliament (an observation which, it may be added, applies also to Dominion companies), and to remark that the second sub-section of s. 12 ascribes an inadmissible meaning to the word "immigrate," which, if governing the interpretation of sub-s. 1, would extend the scope of s. 12 to matters obviously not comprised within the subject of immigration; and that sub-s. 2 is therefore not competently enacted under the authority of the Dominion in relation to that subject. Their Lordships do not think it proper to discuss the limits of that authority, or to intimate any opinion upon the point whether any, or, if any, what effect can be given to the first sub-section of s. 12 as an enactment passed in exercise of it.

It is unnecessary to say more upon the subject of the appeal of the Attorney-General, but the appeals by Adam Craigon and Ellis Elliott Otte must be mentioned. These two appellants were, each of them, convicted of two several offences under s. 508c of the Criminal Code. The charges were laid as the result of a suggestion which arose when the reference first came on for hearing before the Appellate Division, that the questions submitted could be more

(1) [1916] 1 A. C. 588.

J. C.
1924
ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS.

conveniently dealt with, if concrete cases involving those questions were at the same time before the Court. Facts having been admitted before the magistrate establishing in each case the offence charged, and the defendants having been found guilty, the magistrate reserved for the opinion of the Divisional Court the question of the constitutional validity of s. 508c. This question was answered conformably to the opinions given in answer to the second question submitted under the reference. The Attorney-General of Canada was no party to these prosecutions, which were initiated in response to the suggestion above mentioned, and with the purpose of facilitating the consideration of those questions.

On March 27, 1923, special leave to appeal to His Majesty in Council from the judgment of the Appellate Division on the reference was granted on the application of the Attorney-General for Ontario, and in order that their Lordships might be in possession of all the materials before the Appellate Division, leave to appeal from the judgment of the Appellate Division on the cases stated by the magistrate was at the same time given, and all these appeals were consolidated.

In view of the circumstances in which the charges were laid and the convictions obtained, it is, their Lordships conceive, unnecessary to make any disposition of these appeals, and their Lordships will at present tender to His Majesty no advice concerning them.

It must, moreover, be understood that in the special circumstances the order of their Lordships granting special leave to appeal to these last-named appellants involved no decision as to the power of the Parliament of Canada to enact s. 1025 of the Criminal Code, or as to the meaning and effect of that section; whether or not, for example, it would, if effectively enacted, constitute a bar to an appeal from a conviction for an offence created by a statute alleged to be ultra vires. And on neither of these points do their Lordships give any opinion.

Their Lordships will humbly advise His Majesty to discharge the order of the Appellate Division of December 29,

1922, in so far as it sets forth the answers of that Court to the three questions submitted by the Order in Council of May 10, 1922; and to substitute therefor the several answers to the said questions which have been already indicated. There will be no costs of this appeal.

J. C.
1924
ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents, the Canadian Fire Underwriters' Association: *Lawrence Jones & Co.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

[HOUSE OF LORDS.]

G. . . . . APPELLANT;

AND

G. . . . . RESPONDENT.

H. L. (Sc.)*
1924
Feb. 8.

Divorce—Nullity—Impotency—Wife's Refusal of sexual Intercourse—Absence of structural Incapacity—Invincible Repugnance—Evidence—Inference of Incapacity.

In an action by a husband against his wife for a decree of nullity of marriage on the ground of impotency, it was proved that the husband, whose potency was admitted, made frequent attempts extending over a protracted period to consummate the marriage, but failed owing to the unreasoning resistance of the wife, and that this resistance continued after she had formally consented to perform her conjugal duty. The medical examination of the wife showed that there was no structural incapacity. The parties were on affectionate terms:—

Held, that the conclusion to be drawn from the evidence was that the wife's refusal was due, not to obstinacy or caprice, but to an invincible repugnance to the act of consummation, resulting in a paralysis of the will which was consistent only with incapacity, and that the husband was therefore entitled to a decree of nullity.

A. B. v. *C. B.* (1906) 8 F. 603 applied.

Interlocutor of the Second Division of the Court of Session in Scotland 1923 S. C. 175 reversed.

APPEAL from interlocutors of the Lord Ordinary and of the Second Division of the Court of Session in Scotland. (1)

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, and LORD BLANESBURGH.

(1) 1923 S. C. 175.

H. L. (Sc.) 1924 G. v. G.

The action was brought by the appellant, the husband, against his wife, the respondent, for a decree of nullity of marriage on the ground of impotency, or, in the alternative, for a decree of divorce on the ground of desertion.

The action was founded upon the unreasoning refusal of the wife to permit sexual intercourse.

The appellant contended, upon the first head of claim, that the circumstances of the respondent's refusal were such as to justify the Court in inferring incapacity; and, alternatively, upon the second head, that the malicious, wilful and obstinate non-adherence of the respondent for a period of four years constituted desertion by the law of Scotland, so as to entitle the appellant to a decree of divorce.

The Lord Ordinary (Lord Blackburn) dismissed the action, and the Second Division, by a majority (the Lord Justice-Clerk (Alness), Lord Ormidale and Lord Hunter; Lord Anderson dissenting, and being of opinion that the husband was entitled to a decree of nullity), adhered to the interlocutor of the Lord Ordinary.

The facts are fully stated in the opinion of Lord Dunedin.

1923. Nov. 29, 30; Dec. 3, 4. *Macmillan K.C.* (1) and *David Scott* (both of the Scottish Bar) for the appellant. The laws of England and Scotland are at one in showing that proof of incapacity is necessary in order to maintain an action of nullity of marriage. But incapacity may exist apart from any structural defect, and, although wilful and persistent refusal to allow marital intercourse is not in itself a sufficient ground for a decree of nullity, yet, in the absence of any alleged or probable motive for wilful refusal, the Court may infer that the non-consummation of the marriage is due to some form of incapacity arising from some abnormal condition of mind or body. In this lady there was an aberration from normality in regard to the question of sexual intercourse, and there was ample evidence to justify the inference which was drawn by Lord Anderson that she was incapable of consummating her marriage with this man:

(1) Appointed Lord Advocate on Feb. 8, 1924.

A. B. v. *C. B.* (1); *Napier* v. *Napier* (2), overruling *Dickinson* v. *Dickinson* (3); *G.* v. *M.* (4); *A. B.* v. *C. D.* (5); *M.* v. *G.* (6); *A. B.* v. *C. D.* (7); *S.* v. *A.* (8); *P.* v. *L.* (9); *Hudston* v. *Hudston* (10); *F.* v. *P.* (11) After she had formally consented to perform her wifely duty can it be said that she was wilfully refusing intercourse? This is not a case of wilful obstinacy, but of constitutional disability.

Alex. Moncrieff K.C. and *James Keith* (both of the Scottish Bar). Consent and not concubitus constitutes an unassailable marriage: *Lang* v. *Lang.* (12) A marriage can only be upset by legal or physical incapacity. To justify an inference of incapacity there must be a sufficient period of endurance of the refusal and no explanation of the refusal other than incapacity. On the evidence in this case there is no sufficient basis on which to found that inference of fact. There is here nothing more than a refusal of conjugal rights. That refusal concurs not with incapacity but with contumacity. This case resembles *Finegan* v. *Finegan* (13), where also there was a pre-nuptial agreement that no sexual intercourse should take place for a certain period after marriage. That was treated as a case of persistently declining to consummate without proper reason. The wife refused to submit to examination, and it was held impossible to draw an inference of physical incapacity.

The House took time for consideration.

1924. Feb. 8. Lord Dunedin. My Lords, the pursuer in this case, Mr. G., sues his wife, Mrs. G., asking for a declaration of nullity of the marriage on the ground of impotency, and alternatively for divorce upon the ground of desertion, the desertion being qualified as a wilful and

(1) 8 F. 603.
(2) [1915] P. 184, 193.
(3) [1913] P. 198.
(4) (1885) 10 App. Cas. 171.
(5) (1900) 38 S. L. R. 559.
(6) (1902) 10 S. L. T. 264.
(7) (1902) 10 S. L. T. 266.
(8) (1878) 3 P. D. 72.
(9) (1873) 3 P. D. 73*n*.
(10) (1922) 39 Times L. R. 108.
(11) (1896) 75 L. T. 192.
(12) 1921 S. C. 44, 60.
(13) (1917) 33 Times L. R. 173.

H. L. (Sc.) 1924 G. v. G. Lord Dunedin.

malicious refusal of carnal intercourse. The case was defended by the defender, who denied impotency and contended that there was no relevant averment of desertion. The Lord Ordinary, after proof led, dismissed the action, and to this interlocutor the Second Division of the Court of Session adhered, one judge dissenting and considering that the decree of nullity ought to be pronounced.

A skeleton outline of the married life of the parties is as follows. They were married on November 5, 1913, in Glasgow. On November 16 they went to India, where they lived together till April, 1914. In that month the wife returned to Scotland to be present at the jubilee of her father, who was a minister of the United Free Church in Glasgow. She returned to India on December 16, 1914, and the parties again lived together in India at Nagpur till September, 1915. Then the wife returned to Scotland to undergo an operation for appendicitis. She did not return to India. The husband was called up for military service and sent to Mesopotamia, and he was not free till September, 1920. He reached Perth, Scotland, on September 13, 1920. The parties did not occupy the same house till November 13, 1920, when they came together at the house of the husband's father in Perth. On November 20 the wife went to Glasgow, and since then the parties have not met. The present action was raised on April 14, 1921.

My Lords, in the case of *A. B.* v. *C. B.* (1), while sitting as Lord President of the Court of Session, I had occasion to lay down what I considered the law of Scotland on the matter with which we have here to deal. Neither of the learned counsel who addressed your Lordships, and who on each side conducted this case with great carefulness and ability, attacked the statement of the law I then made, but as the matter has, so far as I know, never been actually dealt with in your Lordships' House, and as I still remain of the opinion then expressed, I think it advisable to repeat part of what I then said :—

" It has long ago been settled that impotency on the part

(1) 8 F. 603, 606, 609.

of one spouse at the time of the marriage continuing thenceforth is a ground for the avoidance of the marriage at the instance of the other, which will be given effect to unless there is a personal bar to be drawn from the solemnisation of marriage in the knowledge of both parties of the defect, or to be inferred from the extreme age at which the marriage is contracted. Further, it is now well settled that a person is in law impotent who is *incapax copulandi*, apart from the question of whether he or she is *incapax procreandi*. The only difficulty, therefore, that arises is in the proof—a proof as to which the Court is bound to be satisfied, lest marriages should be avoided either by collusion or in cases where the fact that there has been no copulation is due to wilful refusal."

After pointing out that the cases are rare where in the case of the woman structural incapacity could be proved, I proceed to say that the question still undecided by this Court is, "whether incapacity in the woman is to be confined to those cases, admittedly rare, where there is what has been termed structural incapacity." I continue: "I see no reason so to confine it, and I am content to adopt in terms the words of a very great authority on such subjects, the late Lord Penzance, in the case of *G.* v. *G.* (1) He said: 'The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted; but the basis of the interference of the Court is not the structural defect, but the impracticability of consummation.'"

The learned Lord Justice-Clerk in this case has commented upon the use of the word "impracticability" as ambiguous. With great deference, he has missed the point of Lord Penzance's observation; he was speaking of structural incapacity on the part of the wife. The impracticability, therefore, that he was speaking of was impracticability from the point of view of the wife, not from the point of view of the husband, and therefore it is quite obvious that the use of the word excludes and does not admit, as he thinks, of the alternative of wilful refusal. I further quote with approval language which I borrowed from Sir Francis Jeune in the

(1) (1871) L. R. 2 P. & M. 287, 291.

H. L. (Sc.) 1924 G. v. G. Lord Dunedin.

case of *F.* v. *P.* (1): "that if it be satisfactorily proved that repeated endeavours of a potent husband, who has tried all means short of force, had been uniformly unsuccessful, it was for the Court, in the absence of any alleged or probable motive for wilful refusal, to draw the inference that the non-consummation was due to some form of incapacity on the part of the wife."

The wife here submitted herself for examination, and was examined by Dr. Haig Ferguson, an eminent gynæcologist in Edinburgh. We have his report, and it affirms that there is no structural incapacity in this lady's case which would prevent the consummation of the marriage. Further, it is not matter of controversy between the parties, first, that there is no want of potency on the part of the husband, and, secondly, that there never has been actual consummation of the marriage.

In the case of *A. B.* v. *C. B.* (2), where decree of nullity was granted, I summarize the facts that I held as found as follows:—

"(1.) That the marriage never was actually consummated. (2.) That the husband was able and anxious to consummate, and had more than sufficient opportunities, free from any circumstances of a disturbing nature, either mental or physical. (3.) That, short of physical force, he adopted all ordinary expedients to induce the wife to admit connection. (4.) That no reason whatever is suggested for a wilful refusal on the part of the wife, and that the whole probabilities of the case point to an opposite conclusion."

The first three apply to this case. The real question arises on the fourth. The facts of the case in *A. B.* v. *C. B.* (2), however, provide no assistance; the facts are not fully set forth in the report, but I have procured the Session papers in the case, and after a perusal of them I arrive at the following conclusion. The wife defended, but after the husband (the pursuer) had been examined she made an offer through her counsel to adhere and fulfil her conjugal duties. This offer was accepted by the husband and the case sisted till a date

(1) 75 L. T. 192. (2) 8 F. 603, 609.

fixed to allow the parties to come together. Just before that date the husband presented a note to the Court setting forth that the wife had still failed and asking a further extension of the sist. The wife's counsel was instructed to oppose the motion and to ask the Lord Ordinary to fix a date for the continued proof. The Lord Ordinary accordingly fixed a date for the continuation of the proof. When the day arrived the wife's counsel said that he was instructed to watch the case, but that he would take no further part in it and lead no evidence. In these circumstances I think it can hardly be doubted that the fourth conclusion at which I arrived was well founded; but it is equally clear that the facts of that case give no help by way of analogy to the facts of this.

My Lords, to determine, as we have to do, whether we are ntitled to draw the inference that refusal has been due to incapacity and not merely to wilfulness is obviously a matter of delicacy and difficulty; none the less the difficulty must be faced and a determination come to according to the view that we take of the evidence. It necessitates, however, a somewhat minute examination of the married life of the parties, and I make no apology for having to bring before your Lordships that history in very considerable detail.

The witnesses examined for the husband were himself, his mother, and Dr. Haig Ferguson: on the part of the wife only she herself was examined. As will be gathered from the skeleton account already given, the married life divides itself naturally into four periods—(1.) the period from the marriage in November, 1913, till the wife went to Scotland in April, 1914, during which they were together; (2.) the period from April, 1914, when they were apart till she returned to India in December, 1914, on till September, 1915, when she again left for Scotland; (3.) the period from September, 1915, till September, 1920, during which they were apart; and lastly, the period extending from September, 1920, when they met and were together at Perth for a week, when she left, up to the date of the action. During all the periods of separation they corresponded, and there has been produced the correspondence so far as extant. It is not at all complete, but

H. L. (Sc.) 1924 G. v. G. Lord Dunedin.

it provides a valuable commentary on the attitude of the parties. I shall deal with each of these periods in turn.

First Period.—The parties had previously met and made acquaintance in India, but the engagement was only arranged in October, about a month before the gentleman was bound to return to India. The wife explains that she was unwilling to enter into a hasty marriage, but gave way to his entreaties that they should be married, so that she might accompany him to India. She had views on marriage, which may be characterized as unusual, without employing a more forcible term. To quote her own words: "My idea of marriage had been for a good many years something which was rather different to the sort of what is called physical union; I had a feeling that it ought to be a spiritual union first of all, and I intended that that sort of thing should grow in the time of our acquaintanceship in our living together before the physical side was developed."

In pursuance of these views she had a talk with her intended husband on or about November 1, in which she asked him to consent that there should be for some time no physical union between them. As to the duration of this arrangement the parties give different accounts. He says that it was to be for one year certain. She says it was to be for "a year or two," which expression she interprets as meaning for one year and for something more, with an absolute limit of two years. Quoting again her own words, "he unwillingly consented to this condition." He says that there was no alternative between consenting and putting off the marriage, and that therefore he chose the former alternative. Having consented, he kept his bargain, and it is common ground that for the first year, or, in other words, for that part of the first year during which they were together, that is, from the marriage in November, 1913, till April, 1914, he, although he occasionally got into bed with his wife in India, where they had two beds, not only did not have connection with her, but made no attempt at doing so. He does not seem to have complained of the undertaking he had assumed. This ends the first period.

Second Period.—No correspondence has been produced covering the time when she left India in April, 1914, till she returned in December, 1914. The parties met at Bombay and stayed two nights in an hotel; they had a double bed, which they occupied together. By this time the year which he said was the duration of the pact of abstention was out; accordingly he depones that he at once tried to effect connection with her, but was repulsed. On arriving at Nagpur, which was their home, they had separate beds, but he depones that on many occasions he left his own bed, entered that of his wife and attempted to have connection with her, but always without success. This continued during the whole period of residence at Nagpur till June, 1915, when she had a threatening of appendicitis, and thereafter he desisted till she left for Scotland to be operated on in September.

I do not think it is necessary that I should quote to your Lordships the exact terms in which he described his various attempts; it is sufficient to say that they were animated by such excitement of desire on his part as to entail on occasion ejaculatio ante portam, and conducted in such a manner as to leave no possible doubt as to his object. I would not have said so much had it not been that the learned judges in the Court below threw a doubt on whether these attempts were characterized by what they term a sufficient virility. It is indeed permissible to wish that some gentle violence had been employed; if there had been it would either have resulted in success or would have precipitated a crisis so decided as to have made our task a comparatively easy one. But the husband's answer to the complaint that he did not so act, when put to him in cross-examination, is that he was very anxious to awaken the sexual instinct; that he had found her on many occasions hysterical and tearful, and that he felt that any attempt with even mild and gentle force would only hinder and not help the end which he desired. Such a course of conduct may have been mistaken, but it cannot be disregarded, or, I think, characterized as either want of eagerness or of determination on his part. [His Lordship then referred to the wife's account of what happened.

H. L. (Sc.) 1924 G. v. G. Lord Dunedin.

In effect she denied the frequency of the attempts, but admitted that there were attempts and that she resisted them on every occasion.] It was suggested by her counsel and partly put to her—I say partly, because the question referred rather to the first meeting at Bombay than to the further period—that her resistance was due to the fact that she contended that the pact was still in force. If that had been the real reason I think it is inconceivable that she would not have met his attempts by a protest to that effect, but no word of protest was ever, according to her own testimony, uttered. It is put as a point against him that all these attempts appear to have been made in dumb show without a spoken word either of entreaty or expostulation. The fact is certainly peculiar, yet it is not out of keeping with the explanation already given as to why he did not use a little more force than he did. But though silent in the bedchamber they were not altogether silent on the topic concerned. Both concur in saying that there was a very earnest and prolonged discussion on the subject on or about March, 1915, in Nagpur. [His Lordship then quoted the account given by each of that discussion. The short effect of the evidence was that the husband maintained that they were not legally married until the marriage was consummated, and asked her to agree to have intercourse, whereas the wife maintained that they were legally married and wanted their relations to continue as they had been during the first year.]

After that, according to his testimony, he renewed his attempts, and even more frequently than before, but always without success. The situation was, so to speak, put an end to by the development of appendicitis in June, which prevented him making further attempts.

My Lords, I think it is necessary here to pause and weigh the evidence up to this point. I think it is certain that the pact of abstention was made for a year, and for a year only. I am led to this conclusion by several reasons. First, what I have already mentioned, that admittedly when the attempts were made the lady never excused herself on the ground that the pact still subsisted, and secondly, that inasmuch as the

husband is admitted loyally to have kept the pact during the first year, it is, I think, unlikely that he would at once have broken it when they met at Bombay if it had been for more than a year. Further, when the subject is admittedly discussed in March, 1915, she argued about marriage and asked that the present state of affairs should continue, but did not allege that he was bound to desist his attempts. The question with what degree of frequency the attempts were made (as to which there is controversy) is not very important; it is enough to say that they were made both before and after the discussion in March, and that they extended consequently over a very considerable period, a period too long to admit the idea of a temporary aversion. To what, then, is the wife's constant refusal to be attributed? Had the evidence stopped here, the question might have been doubtful; but this at least can be said, that the evidence is just as consistent with an invincible repugnance as it is with a mere obstinacy of denial, and it is in the light of that view that the further evidence now to be mentioned must be approached.

We now come to the third period, during which the parties are separated, and from this point we have the advantage of the correspondence. We must take it that she left India perfectly aware that her husband was still anxious for the ordinary rights of a husband and that she had never gratified his wishes. Speaking generally, the correspondence on her side began by being affectionate, but soon got captious and tiresome, chiefly showing an exaggerated jealousy of his affection for his mother. His, on the other hand, is at once affectionate and temperate. There are not many letters in which the subject of conjugal relations is touched on—as I have already said, this correspondence is not complete—but it is certain that there was a renewal of discussion on the subject, which seems to have culminated in a certain letter of February 17, 1916. This letter is not extant, having been subsequently destroyed by the spouses, as will be hereinafter related. [His Lordship then quoted the evidence of the spouses as to the effect of this letter, the main purport of which was that she suggested that he should either refrain

H. L. (Sc.) 1924 G. v. G. Lord Dunedin.

from intercourse altogether or divorce her. His Lordship also referred to a letter by the wife of February 23, in which she intimated that their marriage was a failure and hinted at suicide. He also quoted a long letter by the husband in reply containing a reasoned remonstrance against her attitude, and referred to some further correspondence by the wife, which continued until the husband was sent to Mesopotamia, after which there was little more correspondence until he left Mesopotamia in 1920.]

On September 8 he wires from Marseilles that he is on his way to Perth—and here begins the last period. He came back to this country, and then ensued a foolish contest between the spouses in which neither is free from blame. He wished to go to Perth to his parents' house and that she should join him there. She wanted him to go to Glasgow, where she was residing. Neither would give way, with the result that they did not meet for nearly two months. After a futile meeting at Perth Station for a few hours she at last consented to go to Perth, and accordingly, on Saturday, November 13, 1920, he went to Glasgow and with her to Perth, and took her to his parents' house. They occupied separate rooms on the 13th and 14th. On Monday, the 15th, they had a long talk on the subject of coming together. It began by his complaining of the letter of February, 1916, and the proposal contained therein. She said she did not remember the letter; he then went and fetched it and read it to her, after which she said she regretted having written it, and the letter was burned. The testimony of the husband and the wife here becomes divergent. His story was that the letter was burned in a sort of ceremonial way, each holding a bit and throwing it in the fire; that she expressed her willingness to cohabit in the fullest sense, and, accordingly, believing all to be well, instead of occupying separate rooms they occupied a double-bedded room on the night of the 15th and slept in the same bed; that when in bed he attempted to have connection with her with the same insistency as he had in India, and he was met by a refusal. The next night again they occupied the same bedroom, but before coming to bed she had an

hysterical crise de nerfs of such violence, raised by the question they discussed whether they should go to Glasgow or remain at Perth, that he thought it advisable not to try. On the 17th she had got over the crise by midday, and on the three following nights they again occupied the same bed, he each night attempting and she each night refusing. [His Lordship then quoted the evidence describing the attempts. In this evidence the husband stated that on one of the nights in question when he had his pyjamas open and down his wife told him he had better get out and tie his pyjamas, and he also stated that it seemed to him that, in spite of the understanding that he thought they had come to, his wife was unable when it came to the point to put it into action.] On the 20th she went back to Glasgow, his understanding being that she would come back, but this she never did. He asked her to come, but she would not. Eventually, in February, 1921, feeling that the matter was hopeless, he raised the present proceedings.

Reverting to the arrival at Perth, the defender's account is to the following effect. She says, first, that a change had come over her, and that she went to Perth determined to allow him his full marital rights. She admits that she said she regretted the letter of February, 1916, and admits that it was burned on the morning of the 15th, though she denies that there was any ceremonial attitude in the burning.

Her account of what followed had best be given in her own words :—

"I remember saying to the pursuer once the letter had been burned that I understood now that it had no further significance between us, and that was absolutely my understanding. Before we parted at the time this letter was burned the question of our married relations had made part of the subject of discussion. I told the pursuer that upon the question of the condition my wish had changed. (*Q.*) What did you say you were prepared to do or wished to do ?—(*A.*) After we burned the letter we talked amicably for a few moments, and I suddenly said—I don't know what

H. L. (Sc.) 1924 G. v. G. Lord Dunedin.

made me say it—'Do you still wish this kind of thing?' and he said, 'No; besides that, I don't think it would be safe.' I said, 'Why not safe?' and he said, 'At your age,' and I said, 'Lots of women have children when they are over forty.' I remember making it clear to the pursuer that on the question of willingness I now was willing to do what he wished. (*Q.*) Did he say, when he was making this reference to safety, that he was satisfied now that you had given in on the question of will?—(*A.*) He did. (*Q.*) And did he introduce the question of your safety in the event of a child being born?—(*A.*) Yes, after my asking that question. (*Q.*) When you parted after that meeting did you understand that you had told him you were willing to do what he wished, that he had accepted that in full, and now, in the interest of your safety, did not desire that any connection should take place?—(*A.*) I understood it like that, of course."

She then admits being in bed on the nights specified, but denies that any advances were made or repelled. When pressed with the pyjamas incident she admits that he loosened his pyjamas, but no more. She admits that she left for Glasgow and did not return.

This ends the story, except only as regards two matters. As to the hysterical crise de nerfs on the Tuesday at Perth there is corroborative testimony from the pursuer's mother. The other matter attains an importance which, frankly speaking, I do not think it deserves, from the fact that it greatly impressed the learned judges of the majority. It is this: After her departure from Perth he wrote her a letter on November 20 as follows: "My own wee Girlie,—I wonder what sort of a journey you had to Glasgow to-day, and what sort of a day you have had there," and after some discussion as to other matters the letter continues: "I have been feeling rather miserable to-day. I have been wondering why you went away so soon. I hoped you would have told me before you went, and you gave me no idea when you would come back. It is such a waste of time your leaving me alone. The house is very quiet without you, and I have been missing you. Perhaps there will be a letter on Monday from you. I

hope there will be. You didn't even leave anything behind for me to take care of! It is silly having to say good-night with a pen when we don't need to. Good-night, wee Girlie, sleep sound.—Your loving ROBIN."

My Lords, I am now in a position, after this long recital, to state the conclusions at which I have been compelled to arrive after a careful consideration of the whole case, and the reasons for those conclusions. It is evident that everything turns on the view taken of the incidents at Perth, though one must approach those incidents with a mind informed as to the past history. Now what was that past history? I have already commented on the evidence as to the second period in India, but I so far repeat what I then said. Here was a husband who was obviously very anxious to obtain a husband's rights, a husband who had shown rare forbearance during the first year, but who had then tried to assert his rights in India without success. Then came a period of enforced separation, but during that period, in correspondence, her attitude had been discussed from time to time, and in particular her proposal of February, 1916—that abstention should be perpetual—had been received with sorrow and argued against. Then follows a series of petulant letters on her part, affectionate and forbearing letters on his. He comes home, and, after a foolish contest as to where they should meet, they do meet. The position is then made matter of grave debate on the Monday; the offending letter of February, 1916, is produced, apologised for on her part, and then burned, and then, according to her own testimony, she expresses her willingness to be all that a wife should be and to do all that a wife should do. Then ensues her statement that the moment she had expressed that willingness she added the question: "Do you really wish this kind of thing"—there can be no doubt as to what that means—"to go on?" and that there and then he said that he was content with his moral triumph and would exact no such sacrifice. A more wildly improbable statement was never, I think, given in the witness-box. To suppose that this man, who had been all these years longing for one thing only,

H. L. (Sc.) 1924 G. v. G. Lord Dunedin.

in so far as his conjugal rights were concerned, should, when at last he was told she would accede to his wish on that very point, turn round and say that he would be content with a moral triumph and not only give up his wish but abstain from doing what every natural feeling in a married man prompts him to do, is to my mind utterly beyond the bounds of credence. Why should they, after the interview, give up their separate rooms and betake themselves to another room and a double bed, if not to give her the opportunity of fulfilling her promise? And if she went to him with, as she herself says, the expressed intention of allowing him to possess her, is it credible at all that he should not behave as we know that she admitted that he behaved in India, and if, as she reluctantly admits, he loosened his pyjamas, from her Indian experience she knew well enough what that meant. We have then a repetition of all that happened in India, and a repetition by a woman who said that she had made up her mind to consent. I for myself can only come to this conclusion, that the reason she did not consent in fact, as she had in mind, was that she was unfortunately the victim of such an invincible repugnance to the physical act as to paralyse her will power to carry out what she had promised. The utter improbability of her story as to his renunciation of all he had striven for would strike, I think, every man. The learned judges of the majority were undoubtedly affected by the same idea, but their idea was changed simply and solely by the affectionate terms of the letter of November 20. That letter enables them to say credo quia incredibile. With much respect, I draw no such deduction. On the contrary, it seems to me consistent with the man's whole conduct. He had been baulked and thwarted in India, yet he still continued to express the terms of affection. Even on this occasion, though doubtless bitterly disappointed, he thought she was coming back to Perth, and I can quite understand that, with his usual method, he did not wish by reproach or bitterness to spoil the chance which he always cherished of overcoming her obvious repugnance. Probably it was only after reflection that he came to the conclusion that,

after all, it was sheer incompetency on her part that had led to all his failures.

Great stress was laid by counsel on the shortness of the period at Perth as inadequate to give a full trial, and we were reminded of the three-years' period demanded by the Canon law. Although in our law we have not adopted any rigid period, yet doubtless there must be a sufficiency of opportunity. Had the Perth episode stood by itself I do not hesitate to say that I should have considered it to be too short. But it did not stand by itself; it cannot be dissociated from the former experiences in India.

My Lords, I confess I have come, without difficulty, to the same conclusion and for much the same reasons as are so well expressed in the dissenting judgment of Lord Anderson. This woman begins with an ante-nuptial aversion to the sexual part of marriage, which finds expression in the promise she got from her husband as to the first year. Unfortunately, as I think, for the happiness of all concerned she chanced on a man who gave a promise which not one in a thousand would have given, and which, if given, not one in a hundred would have kept. Arrived in India, the promise no longer in force, she resisted every attempt on his part during a protracted period. When she goes home, and knowing from his letters that his desire remained unaltered, she began all sorts of objections and arguments—as to risk of child-birth, the inconvenience of children in India, etc., etc.—which Lord Anderson well describes as camouflage to cover up her own aversion, and then when at last he comes home and she recognizes that the time has come when she must fulfil her duty she signifies consent, and yet at the last moment finds herself unable to make that consent good. I am of opinion that we may and must draw the inference that it was incapacity that prevented her, and I think that the pursuer is entitled to a decree. I therefore move your Lordships that the interlocutors of the Court of Session be reversed and the cause remitted with instructions to pronounce decree in terms of the first conclusion of the summons.

In these circumstances it is, I think, unnecessary, and

H. L. (Sc.) 1924 G. v. G.

would, I think, be improper, that your Lordships should give any opinion on the plea of desertion; but this must not be taken as the slightest indication on my part that I disagree with the opinions expressed on that part of the case by the learned judges of the Court of Session.

Lord Atkinson. My Lords, I have had the pleasure and advantage of reading the elaborate and convincing judgment that has just been delivered by my noble and learned friend on the Woolsack. I concur in it, and I have nothing to add.

Lord Shaw of Dunfermline. My Lords, I need not say that I have found this case to be one of extraordinary difficulty. There are many passages in the judgments of the learned judges in the Court below to some extent reflecting upon the conduct of the appellant, with which I entirely disagree; while upon the whole question of the behaviour of the respective parties, I think that Lord Anderson has taken much the sounder view. But these opinions do not lead me any length in the solution of the fundamental issue of this case. That issue, as I view it, is whether the refusal of the respondent to consummate the marriage can be ascribed to a cause which the law can hold to be such incompetence as can ground a decree of nullity of marriage.

After much reflection I agree with the judgment just read to the House by my noble and learned friend on the Woolsack.

So far as the law of this matter is concerned, I feel much indebted to my noble friend for the exploration he has made of the facts in the case of *A. B.* v. *C. B.* (1) In my opinion that case, although, like the present, difficult and narrow, was correctly decided; and, taken along with the observations thereon just made in this House, it must, in my opinion, stand as a leading one in this branch of the law of Scotland. But of course its limits must be observed as an authority. I take these limits to be that it is now settled that Courts have the power to annul the contract of marriage on the ground

(1) 8 F. 603.

of incapacity, although that incapacity may not be structural; room is still left for a declaration of nullity, although structural incapacity is not proved. There may be cases—rare and extreme cases they of course must be—in which incapacity is established de facto to exist, that incapacity not being a mere hostile determination of the mind arising from obstinacy or caprice, but such a paralysis and distortion of will as to prevent the victim thereof from engaging in the act of consummation. From this paralysis and distortion the incapacity arises. I have said that these instances are rare and most extreme, while of course Courts of law must be alert to dissever them and differentiate them from cases arising from any minor cause such as the obstinacy to which I have referred. Otherwise the marriage tie could be severed by a thing which is the very opposite of incapacity, not a powerlessness of will, but a resolute determination of will in the direction contrary to duty.

These are the considerations which make all such cases, and this case, raise one of the most difficult problems in law.

Upon the facts it need not be wondered at, after the convincing and cogent summary already announced to the House from the Woolsack, that I should avoid repeating anything. This is of course according to one's natural inclination, looking to the subject under discussion.

I desire to say specifically, however, with regard to Dr. Ferguson's evidence, that I accept it upon the point that there is no structural incapacity. Beyond that I have some doubt as to whether the evidence of that witness was competent. If, however, it be assumed to be competent, I think it comes to no more than this, that it contains the expression of opinion of a thoughtful and reflective medical man upon a delicate question which is truly a question of law, and that the Court accordingly must decide the legal question for itself and apart from the shelter of a medical witness whose evidence, in that portion of it to which I refer, cannot be treated as an exposition of scientific reality. The Court must take this matter apart from such shelter.

H. L. (Sc.) 1924 G. v. G. Lord Shaw of Dunfermline.

On the general facts of the case I would only add, to the summary of and pronouncement thereon by Lord Dunedin, the following points.

I look upon the period from December, 1914, to June, 1915, when the parties resided in India, as one of crucial importance. The year of abstention—namely, from the marriage in November, 1913—had come to an end. I have no doubt that the period over which the unfortunate and stupid bargain of abstention was made was one year and no longer. During, accordingly, these months from December, 1914, to June, 1915, at which latter date symptoms of appendicitis in the lady appeared, it is beyond question that frequent efforts by the husband were uniformly and steadily repulsed. I do not further advert to that fact, except to say that I think this case must be taken on a conspectus of the facts as a whole, and that it would defeat justice to exclude the experiences of those months in a consideration of what is the correct view of the still more crucial period when the attempts at consummation in Perth failed. I look upon the Perth incident from a point of view very different from that from which it was viewed by the majority of the judges in the Court below. I think there had been no lack of effort, and that it is quite erroneous to construe in that sense the husband's excessive patience and his extreme desire, by the avoidance of force, to do nothing which should impair the respect due to him from his wife and due to him from himself. All this I look upon as corroborated completely by the written letters in the case, none of which seem to me capable of a construction consistent with the absence of natural desire and even eagerness upon his part.

The important event that then transpired was, in my opinion, this, that the wife by letter had positively refused consummation. She had considered the matter, and I do not doubt that she considered it very fairly, and that she came to the conclusion that her conduct was undutiful and wrong; that she then joined with the husband in burning that letter and offered to do her conjugal duty. I disbelieve the pretence that she made in the witness-box in answer to somewhat

leading questions put to her, that when she had reached that stage, her husband, having conquered her will, released her from her duty. In a word, I am not so constituted in weighing legal evidence as to believe the incredible.

But, my Lords, there is one letter in the case, written by this lady to her absent husband on April 6, 1916, while he was on service abroad, in which she raised various questions with him, such as heredity, with its dangers, all of which I humbly think were mere sophistication in order, if possible, to justify to herself a refusal which she knew, as I say, to be undutiful and wrong. But with regard to consummation she concludes her long statement of reasons with this sentence: "I have no pleasure, but decided repulsion at the possibility of it."

My Lords, I think this lady, in that blunt sentence, spoke the positive truth. It was this repulsion which, throughout, broke down all promises of amendment, all ideas of duty, all the regard, respect, and affection which she otherwise would have honoured by yielding to her husband's desires. And the pitiful truth is that this lady, in my opinion, was unable to consummate this marriage. It was, I have come to be of opinion, not a case of obstinacy arising from a capricious or wilful disposition, but it was a case of that powerlessness and distortion of will to which I have already referred and which prevented her performance of her duty. It was not a case, therefore, at that stage of it, in which her conduct was blameworthy. I believe that she was incapable. This point is clearly brought out by the refusal at Perth, even while her vows were quite fresh, to yield to her husband's embraces. The invincible repulsion again appeared, and the whole sad story had, as it were, to begin again.

I may be asked, was this incapacity in the psychological or the physiological sphere? To this I reply that I do not know. The bounds between these spheres, as science advances, grow more and more difficult to determine. But in deciding this case affirming incapacity, I do so on the ground that the lady was afflicted with a repulsion (a term which she herself employs) so ineradicable and so invincible, as can only be

H. L. (Sc.) 1924 G. v. G.

explained by incapacity. It is on that ground—I admit, a rare and exceptional ground—that I think the facts proved in this case entitle the husband to the remedy sought.

Lord Phillimore. My Lords, if the happenings in the month of November, 1920, should be resolved in favour of the pursuer, there would not be any serious difficulty in deciding this case.

The bargain upon which the defender insisted before marriage does not strike me as altogether unnatural. Her point of view was well put by her counsel at your Lordships' Bar: "You must still woo me before you win me." The marriage having been hurried on to suit the pursuer's engagements, he was not to consider that he had thereby acquired at once and de plano the ordinary privileges which accrue to a husband, though it was not contemplated that there was any doubt but what he would acquire them some day.

Still, such a bargain made and adhered to by a grown woman showed some want of sexual instinct. It had, moreover, an unlooked-for consequence. There grew up between the spouses, with her sanction, a system of intimate caresses just falling short of sexual connection, which she found sufficient and satisfying, and which she came to regard as reaching the limit of their conjugal intimacy. From thenceforth she strove, while in India, that this limit should not be overpassed. She gave other reasons. People can always find reasons. People can often deceive themselves. But the real springs of her conduct during both the Indian periods were these two: desire for what I may call the symbols of affection striving with a repugnance to its sexual expression.

At times one motive was dominant, at times the other. During the first Indian period his chivalry was such as to cause her, being what she was, little trouble. During the second period there were disturbing passages. And after she returned to England for the second time, at any rate after she had had some trouble with his parents over small money matters, the shrinking from sexual union almost wiped out the desire for his companionship in any form.

But as time went on and she became lonely and her husband was about to return home, possibly with some of the halo which encompassed every one returning from having done his duty in the war, she felt some craving for his presence, and much pique at his refusal to come straight to her. I notice the gradually increasing warmth of her letters. H. L. (Sc.) 1924 G. v. G. Lord Phillimore;

Thus in the letter of September 12, 1920, she writes :—

" When you receive this you will wire or write to Glenarden, Crianlarich, where I go to-morrow (I should have waited on here, but it seems useless to wait on indefinitely), telling me if you will come out to C. sometime this week. We can give you a room at the digs where we are, so you could stay a night or two if you wished. If you could arrange to come between Monday & Friday if possible, as we had some time ago invited a friend to spend the week-end with us. I wd. like to discuss with you what is to happen next, & what I had previously planned to do, by way of a holiday till the end of the mo.—With love,

JEAN."

But on September 22 :—

" Dear R.,—I cannot tell you how surprised and vexed I am that you have now been over a week in Scotland & yet you have never come to see me, nor made any attempt to do so. Why is this ? Of course you have spoken of my coming to Perth, which is not possible for me to do meantime, not, at least, before we have met by ourselves first of all. When & where will you come to meet me ? I shall be at home & alone next week, in Glasgow. Will you come to me there, say on Thursday, & stay a few nights with me ? As I have said, I can't understand the reason of this delay in our meeting, but whatever it is I am perfectly certain that nothing will be cleared up till we see each other face to face, & that not in the presence of others. Surely, Robin, you are sensible enough to see the wisdom of this. So please arrange to come to me soon, as I am longing to see you."

And on October 7 :—

" My dear Robin,—If you can't come here before Sunday please come on Monday or Tuesday at latest, for at least a

H. L. (Sc.) 1924 G. v. G. Lord Phillimore.

week. I don't know how much or how little you are wanting me, but I do know that I am wanting you very badly. So please come as soon as you can.—Your loving

JEAN."

Then on October 10, after the infructuous meeting at Perth Station :—

" Certainly my affection for you is not dead, and you therefore understand what pain I am enduring."

Lastly, on November 4 :—

" (Dear R.),—As you gave me no address I cannot send a letter with the certainty that it will reach you on the 5th. I can't say how disappointed I am that we are not to spend that day together—the first opportunity we might have had since our wedding day. However, if you do not very much mind, I suppose it doesn't matter that you are in London & I am here. . . . .

" I do think, Robin, that as I have decided to come to Perth, it is surely not too much to ask of you to come & fetch me.—Yours,

" JEAN.

" *P.S.*—This is the 5th and there is no word from you.—Oh Robin, what has happened to you ? "

I couple with this the statement in her evidence that she had thought matters over, and was coming to see them in a new light, and to feel a real regret.

Then when she comes to Perth she notes that, for the first time in their married life, they were to occupy separate rooms, and immediately inquires why she was to be left by herself. Whether she expected sexual union that night, or at a later stage, or merely the old caresses, does not matter. At the least she expected the least of these ; and if, after all that had happened, she expected her husband to be content with the least of these, it indicates a remarkable absence of what I may call " sex-consciousness."

However, she is pointedly shown that she must take all or none. Her husband will not sleep with her till he has had an explanation. Then comes the explanation on the Monday

the burning of the letter, and, as both agree, her consent to perform her full wifely duty and, finally, her reception of him into her bed without protest, and without expression of surprise.

And the result that night, and other nights, is the same as in time past—no objection to a certain amount of bodily contact, or to certain caresses, no expression of aversion, but just an escape from or evasion of the complete act.

Putting together his statements and her admissions I am clear that he attempted to have sexual intercourse on four of the five nights during which they slept together.

But she remained a virgin, and after the fifth night went back to Glasgow for some engagements, giving him the impression that she would return, but never afterwards offering to return nor, as far as the correspondence shows, repeating her invitation to come to Glasgow.

I must now go back to the happenings on Monday, November 13, when the spouses had an explanation and reconciliation, and the obnoxious letter written by her on February 17, 1916, was solemnly burnt, and the wife expressed herself as willing to consummate the marriage. So far the two spouses agree, and they also agree that some mention was made of the question of childbirth, and some fear expressed by one or the other as to the consequences at her age.

Then comes the divergence. His account is that she asked what would be his feelings if they never had children, and he replied, in substance, that if they did their best the matter was in God's hands. Her account of the matter is, that upon the question of non-intercourse her previous wish had changed, that then a thought came into her mind, and she suddenly asked him if he still wished that kind of thing; that he said: No, and, besides, he did not think it would be safe; that she asked him why, and he said because of her age; then she replied, lots of women had children at forty; and that finally, after she had made it clear to him that she was willing to do as he wished, he said he was satisfied now she had given in on the question of will.

H. L. (Sc.)
1924
G.
v.
G.
Lord Phillimore.

This was her account in Court; but her precognition must have differed, because the story put to her husband, on cross-examination, was a less extravagant one, that the suggestion of fear of childbirth came from her, and then he said he would not insist, but be satisfied with her having given in.

The Lord Ordinary says that, though the defender gave every appearance of speaking the truth, the story would be incredible if there were not other evidence. By this I take him to mean that it was a story which could not be accepted, even at the mouth of an apparently trustworthy witness, without corroboration. But he finds this corroboration in two points, with which I will deal in a moment.

The Lord Justice-Clerk, on the whole, concurs with the Lord Ordinary; but he puts his judgment in an alternative form. Lord Hunter makes no pronouncement. Lords Ormidale and Anderson do not believe the defender's story.

The two items of corroboration which the Lord Ordinary finds are: (1.) that which he conceives to be an uncertainty or hesitation in the husband's denial of the wife's story when put to him; and (2.) his letter of November 20.

As to the first item, I think that Lord Anderson has put the matter neatly when he says that the Lord Ordinary has decided the case "mainly on the turn of a phrase." I do not think that the husband realized, or that the tenor of the cross-examination was such as to make him realize, that it was being suggested that he had given up his hard-won marital rights. He thought it was a sort of argumentative item or a stage in a long and complex conversation which he was being asked to recall and which he was doing his best to remember and could not.

As to the letter, it does require consideration. But it is of a piece with his whole treatment of the case. He would not regard himself as "tricked"—the phrase used by the Lord Justice-Clerk—or as having been "deceived and disappointed," as the Lord Ordinary puts it.

"Disappointed" he may have been; but not altogether hopeless of future success; and after all, he was tied to her,

and his only hope was that he might by slow degrees bring her to overcome her repugnance. Lord Ormidale thinks that if they had remained under the same roof he might yet have succeeded.

On the other hand, your Lordships have the fact that he did attempt to have intercourse and no suggestion that he was then reproached for going back on his word, unless it be in one curious unexplained phrase used by the wife when, in answer to a question whether he did not on the first night following attempt intercourse, she said: "No, and, moreover, you are omitting the conversation which we had the same morning when I asked him did he still want to do it and he said no. Wouldn't that put one off their guard to begin with?"

Then your Lordships have her letters in February, 1921, after he had announced his intention to sue for nullity. The first letter of February 8 is captious; but neither in it nor in the later one of the 12th, which is of a more entreating tone, does she set up the alleged renunciation of his marital rights.

I do not accept this statement of hers; and then the matter rests on her having agreed to give way to his wishes, and on his having attempted sexual intercourse and yet having failed.

The Lord Justice-Clerk alternatively thinks that the time was not long enough, for he will not couple with it the incidents of the second period in India. Lords Ormidale and Hunter think he did not pursue his advances far enough. I think it is impossible to sever the two periods; and I feel satisfied that the husband's advances were sufficient to awaken any sexual instinct that there was in the wife. I can put it further. They were sufficient to show her his desires which she should if she could gratify, and which she had intended to gratify. The alternative then is between wilful refusal and sexual incapacity.

It seems to me that the wife never disliked her husband; nor was she repelled by his physical proximity; that, at any rate, during the latter part of the second period in India she knew what he wanted and had no reason for refusing him;

H. L. (Sc.) 1924 G. v. G. Lord Phillimore.

furthermore, that at Perth she was very desirous to please, and was aware that the only way in which she could please was by submitting to his desires; and yet she could not manage it.

It was not a case of persistent refusal, but at first of unwillingness caused by her sexual defect, and finally of direct physical incapacity.

This brings this case under the same line as that of *A. B.* v. *C. B.* (1) in the Court of Session, and of the judgment of the noble and learned Lord who was then Lord President.

That case will now receive confirmation at your Lordships' hands.

I should like also to rely on the judgment of Sir James Hannen in *P.* v. *L.* (2), particularly as explained by him in his later judgment in *S.* v. *A.* (3), when he says: "There was no physical impossibility in the grosser sense of that expression, but it was proved to my satisfaction that the respondent was not really and truly in nature a woman . . . . and . . . . being entirely free from the passions of women in that respect. . . . ." Conformably to this is the decision of Sir Francis Jeune in *F.* v. *P.* (4)

The evidence here seems to me to prove "invincible repugnance," "invincible" in the full sense of an unconquerable, uncontrollable nervous condition which is physical and which creates nullity. I therefore agree with the rest of your Lordships that this judgment should be reversed.

Lord Blanesburgh. My Lords, I, too, have in this case reached the conclusion in favour of the appellant at which all your Lordships have arrived. But I have found the problem presented to the House a very perplexing one, beset with difficulty at almost every turn. In view, however, of the speeches already made, I propose in what follows to direct attention mainly to certain aspects of the case which appear to me to support the view of the appellant, but which have not hitherto been very fully discussed. In doing so, I

(1) 8 F. 603.
(2) 3 P. D. 73*n*.
(3) 3 P. D. 72, 74.
(4) 75 L. T. 192.

will avail myself of the very complete statement of the facts just made by the noble Lord on the Woolsack.

In this case physical capacity on both sides being admitted or established, and the sole issue at the moment before the House being whether the refusal of the respondent to consummate her marriage with the appellant was due to wilfulness or to invincible repugnance, it must be of first importance to ascertain, if possible, the real temperament and disposition of the parties, and, in particular, of the respondent.

Now her mentality as disclosed in the correspondence is a highly complex thing. It is not the least of the difficulties in the appellant's way, that the respondent, with, I think, clearly only a weak sexual instinct, stands revealed in her letters as somewhat imperious and very determined, at times exacting, hypersensitive, jealous and unreasonable—a lady, in other words, who might be quite capable of wilfully refusing herself to her husband over almost any period of time if such an attitude was in accord with her humour.

But that is not a complete statement of her disposition. The respondent's letters show her to be capable of ardent affection. Her devotion to her father is very marked. That devotion and her love for her mother are notable traits in her character. More important still, she was always, I am satisfied, genuinely in love with her husband—jealously in love with him, indeed, in the later years of the marriage. This conclusion seems to me to have so important a bearing at almost every stage of the case that it is convenient to give my reasons for it at once, although in doing so I may have to anticipate a little.

My Lords, there can, I think, be no doubt that probably before the appellant's return to England in 1920, but certainly after his meeting with the respondent at Perth Station on October 6, the respondent's feelings towards him were deeply engaged. There is a genuine cri de cœur in her letter of October 7, already read by my noble and learned friend Lord Phillimore, written after that meeting, the first for five years.

"If you can't come here before Sunday, please come on

H. L. (Sc.) 1924 G. v. G. Lord Blanesburgh.

Monday or Tuesday at latest for at least a week. I don't know how much or how little you are wanting me, but I do know I am wanting you very badly, so please come as soon as you can."

Feeling is even more poignantly indicated in the letters written after the appellant threatened proceedings—letters in which the respondent expressed her eagerness to live with him as his wife at Perth or anywhere else he might appoint.

Yet what was the standard by which she measured the depth of her affection, even at that time when she professed herself ready to yield everything? It was its intensity at the time of the marriage.

In her letter of February 8, 1921, she writes:—

"I can only add, Robin, that my love for you is the same as it was seven years ago."

In her evidence, also, the respondent strongly insisted upon her love for her husband at the time of the marriage, and I see no reason to doubt the correctness of either assertion.

For it is not improbable. The appellant and respondent were no strangers when they married. Although it is true that in November, 1913, the actual ceremony was hurried in order to enable the appellant to return to India in due time, there had been a close understanding between the parties, if no actual engagement, for over two years. If we may accept the respondent's statement in her letter of July 19, 1916, the appellant's protestations of affection for her never at any time exceeded those written by him in 1912. In the result I conclude that there was on the part of the respondent a genuine love for her husband—sincere and strong all through—although at times obscured by jealousy and self-consciousness, and existing from before the marriage onwards. We must, I think, interpret the occurrences with which we are now concerned in the light of that all-important fact.

And the first of these occurrences is the promise insisted upon by the respondent, as a condition of the marriage taking place at all, that there should be no intercourse between the spouses for a year. I accept without hesitation the

appellant's statement as to the duration of the promise, which was exacted from him a few days before the marriage ceremony.

Now the fact that the lady, without any previous warning, in love at the time with her intended husband, days after the wedding had been fixed and almost on the eve of its celebration, should have exacted such a promise under such a penalty is, I think, the most striking fact in the case, when regard is had to her age—she was thirty-four, and five years older than the appellant—and to her experience.

Some explanation is required, and three or more are put forward.

The facts last stated dispose, as it very respectfully appears to me, of that favoured by Mr. Moncrieff. The lady required, he suggested, that she should be wooed before she could be won. That will not do, I think. She had been long wooed and she was won.

Her own explanation is also, I think, inadequate. It is that she was at the time, although she did not say so, moved more by the spiritual than by the carnal side of marriage. Her fear was that the ideal of the first might be lost if the second were allowed to obtrude itself before that ideal had been realized.

Now I cannot think that a time limit is appropriate to a renunciation so inspired. But the insufficiency of the explanation is, perhaps, more clearly shown by this, that the feeling of spiritual exaltation underlying the demand—a feeling which presumably continued so long as intercourse was refused—would have been as much offended by what I may call the marital familiarities which the lady permitted as it would have been by the exercise of marital rights. As to this, Mr. Moncrieff's only suggestion, as I understood him, was that the lady took a decadent satisfaction in the embraces which she permitted. I can find in the papers no warrant for that explanation. I think it is only fair to the lady to say, that nowhere is there existent any indication of what may be described as decadent views on this delicate subject.

H. L. (Sc.) 1924 G. v. G. Lord Blanesburgh.

This explanation of the strange bargain being, like the other, rejected, one must be looked for elsewhere. And it is, in my judgment, to be found either in that given by the appellant in his letter of April 17, 1916, where he says: "The real reason which lies at the bottom of your trouble is your original disinclination and fear"; or it was due to the respondent's apprehension that she might feel—as later on she said she did feel—"decided repulsion at the possibility of it."

This explanation alone, as I think, squares with all the facts. First of all it accounts for the limit of time. The lady was in love with her intended husband. She hoped that any repugnance she might, at marriage, feel to the sexual act would disappear after a term of close association which, so far as cohabitation was concerned, she never objected to but indeed encouraged.

It accounts strikingly also for one occurrence—I might say two—which, strangely enough, is said to support the lady's case, but which, to my mind at least, is strongly confirmatory of the appellant's. I refer to the occasion, apparently in July, 1915, when she sought her husband's bed. That was, it seems, one of two occasions on which the same thing happened, although with reference to the second, all that the lady says is this: "I rather think I did once in the first year, but I won't say anything about that act."

Now the suggestion on behalf of the respondent, very strongly urged in the Court of Session, less strongly before this House, was that these were overtures by the wife for sexual relations to which there was no response on the part of the husband. If so, one may ask, why were they made with such timidity that, in the case elaborated in evidence, the husband was left under the impression that the gesture was no more than an offer of peace after a slight quarrel, while the other overture was not, apparently, brought to his notice at all? Why were they made so timidly? What is still more important: Why were they, on neither occasion, repeated? The lady was in love with her husband. This fact is again important. Is it likely if, as the suggestion is,

she desired or was ready for marital relations with him, who, she knew, was eager for them, that she would have left him in any doubt as to her desire, and would so quickly have desisted from her purpose? Surely not. But if, on the other hand, the position was that the respondent, desirous of overcoming this constitutional aversion on her part, had, as she thought and hoped, so far succeeded, that she could venture to make the advance, how natural that that advance should be timid and unconvincing, and, if she found that she was not equal to the effort, how necessary that on neither occasion should it have been repeated. In these two strange incidents, accordingly, I find striking confirmation of the appellant's case.

The conclusion, therefore, at which I may, I think, properly arrive as to this pact, viewed in the light of later events, is that it was imposed by this lady because of her fear that she might be afflicted with an invincible aversion to the sexual act if she were at once required to submit to it. She imposed the ban rather than renounce altogether the marriage she desired, because she hoped that after the lapse of a year's intimate association the repugnance she apprehended would be overcome if it had not by that time disappeared.

And when we come to what my Lord has called the second period, that conclusion is confirmed, because the relations of the spouses during it can, I think, be explained only by the fact that the physical aversion still continued.

But for an admission of the respondent I might, I admit, with reference to this period, have reached the conclusion that the appellant had not made it clear to the respondent that the relations between them now that the pact was at an end were no longer what they had been during its continuance, and that it had not been shown that the endearments in which he indulged during this second period differed in kind from those permitted to him during the first. His operations were all conducted in complete silence, and their intent might have been misunderstood.

But such a conclusion would not be proper in view of the

H. L. (Sc.) 1924 G. v. G. Lord Blanesburgh.

respondent's admissions. The appellant's evidence with regard to this period is, she supposes, correct, and she admits that on every occasion on which he made the advances to which he deposes she invariably turned away. These are very important admissions. The relations between the spouses were not, it must be remembered, during this period disturbed by outside influences. They were not embittered to any extent by jealousy of the appellant's parents. This feeling on the part of the respondent reached its ultimate intensity only after she had left India and returned to Scotland. There is therefore no sufficient explanation of her refusal to be found in this direction, and my conclusion in view of the respondent's admissions is that the whole story is consistent only with inability on her part to respond to the appellant's overtures, and that if the appellant had been conscious of the real cause of her refusal and had then and there instituted proceedings in nullity, his evidence, even thus far available, would have sufficed to secure him a decree.

But to my mind that evidence is greatly strengthened and a clearer light is thrown upon the cause underlying the respondent's refusal during this period by her letters to her husband from this side during 1916, most, if not all, of them written in anticipation of his early return home.

It is in these letters that the mentality of the respondent to which I have already alluded is so clearly disclosed. It is, I agree, plain from the appellant's letters in answer that he had little understanding of his wife's temperament and in complete unconsciousness succeeded in aggravating her when his only object was to soothe. But, making every allowance for this lack of perception on his part, these letters of the respondent can, I think, only be explained by the view that, possibly unconsciously, she seized upon any grievance, nearly always imaginary and invariably trivial, as a justification for her continued aversion to the sexual act, an aversion which indeed she referred to in so many words in the passage I have already quoted. In these letters she went almost so far as practically to sever all relations with the appellant·

Her strictures on his habits were disparaging and insulting. Her underlying affection only leaks out in occasional outbursts of violent jealousy.

We have before us none of the correspondence between 1916 and October, 1918, but there can, I think, be no doubt that the 1916 letters made their permanent mark upon the appellant, nor is it surprising that they did. They were never withdrawn or qualified by the respondent in any communication produced; the appellant's letters became visibly colder, and until after the visit to Perth and the appellant's letter of November 20, 1920, he never got beyond the "My dear Jean" form of address to which the lady so violently objected.

The position when the appellant returned to England in 1920, I think, on his side clearly was that his affection had cooled as the result of his wife's outbursts in 1916, but he was ready and, I think, desirous to start entirely anew if his wife would submit to his inflexible condition that their matrimonial residence while he was here should be at his parents' house at Perth and nowhere else.

If it was the appellant's desire that he and his wife should begin life anew, I agree that no other condition would have been so likely to defeat it, and I cannot myself doubt that it was only the respondent's real affection for him, which after two years of war service had recovered the 1916 eclipse, that at length constrained and enabled her to go to Perth.

And here, in the last stage of the case, I am of opinion that the appellant's account of what happened is on the whole to be preferred to the respondent's. It is indeed more amazing than ever that again the appellant's silence was unbroken. But on the other hand his account is in entire accord with everything that happened throughout their married life—and, if accepted, leads to the conclusion that the respondent, try as she might, could still not bring herself to the marital act.

The Lord Ordinary would have accepted this conclusion emerging from the Perth visit but for the appellant's letter

H. L. (Sc.) 1924 G. v. G. Lord Blanesburgh.

of November 20. In my judgment that letter is on a par with his undated letter of 1916; he was ready to give his wife, when he wrote it, another chance; his patience was not yet exhausted. That he sent such a letter has given me no difficulty. What has caused me trouble was the attempt made by the appellant in the witness-box to explain away its terms. That attempt was, in my judgment, a complete failure, and I do not know that the fact that it was made would not have fatally discounted in my eyes the reliability of the appellant's evidence as to the course of events at Perth had it not been for the respondent's letters written after the final breach between the parties. In these letters, while she offers submission in the fullest terms and begs for another favourable opportunity for demonstrating her sincerity, she nowhere suggests that the appellant at Perth dispensed her from all further marital compliance, as has, in these proceedings, been suggested on her behalf.

These letters, to my mind, re-establish the substantial correctness of the appellant's evidence which, accepted, satisfies me that as in India so at Perth, with every desire in the world, the respondent found herself incapable of performing the sexual act with the appellant.

I think, therefore, that his case for a decree of nullity has been made good.

Interlocutors of the Lord Ordinary and of the Second Division of the Court of Session in Scotland reversed, except so far as they found the defender entitled to expenses. Cause remitted back to the Court of Session in Scotland with a direction to pronounce decree in the terms of the first conclusion of the summons and to do therein as shall be just and consistent with this judgment. The appellant to pay to the respondent the costs incurred by her in respect of the appeal to this House.

Lords' Journals, Feb. 8, 1924.

Agents for the appellant: *Cruesemann & Rouse, for G. & J. Bogie & Anderson, Kinross, and Bonar, Hunter & Johnstone, W.S., Edinburgh.* H. L. (Sc.) 1924 G. v. G.

Agents for the respondent: *Deacon & Co., for Niven & Macniven, Glasgow, and Simpson & Marwick, W.S., Edinburgh.*

[HOUSE OF LORDS.]

NEVILL . . . . . APPELLANT; H. L. (E.)* 1924 *Feb.* 11.

AND

COMMISSIONERS OF INLAND REVENUE RESPONDENTS.

Revenue—Estate Duty—Assessment—Aggregation—Estate settled by Act of Parliament and rendered inalienable—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 4, 5, *sub-s.* 5.

By the Finance Act, 1894, s. 1, in the case of every person dying after the commencement of Part I. of the Act, there shall be levied and paid upon the principal value, ascertained as thereinafter provided, of all property, real or personal, settled or not settled, which passes on the death of such person, a duty, called "Estate duty," at the graduated rates thereinafter mentioned.

By s. 4: "For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof: Provided that any property so passing, in which the deceased never had an interest, ... shall not be aggregated with any other property but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof:"

By s. 5, sub-s. 5: "Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty."

At the time of his death the late Marquess of A. was entitled to

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* *Present:* Viscount Haldane L.C., Viscount Cave, Lord Sumner, Lord Parmoor, and Lord Phillimore.

H. L. (E.)
1924
NEVILL
v.
INLAND REVENUE COMMISSIONERS.

(*a*) certain free property which passed under his will, (*b*) certain property comprised in his marriage settlement under which he was tenant for life, (*c*) certain landed estates of which he was tenant in tail male in possession according to the limitations contained in an old Act of Parliament whereby those estates were rendered inalienable. For the purpose of determining the rate of estate duty payable on the death of the late Marquess the Inland Revenue Commissioners decided that the interest of the successor of the late Marquess in the inalienable estates ought to be aggregated with the two other classes of property above mentioned :—

Held (by Viscount Cave, Lord Sumner, Lord Parmoor and Lord Phillimore, Viscount Haldane L.C. dissenting) that, upon the true construction of ss. 4 and 5, sub-s. 5, of the Finance Act, 1894, as regards the inalienable estates estate duty was to be levied only on the value of the interest of the successor, and that such interest was not to be aggregated with the other property passing on the death of the late Marquess, but was to be treated as an estate by itself.

Decision of the Court of Appeal [1923] 2 K. B. 18 reversed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Sankey J.

The facts, which are fully stated in the report of the case before the Court of Appeal, may be shortly summarized as follows :—

The appellant was the surviving trustee of the marriage settlement of the late Marquess of Abergavenny, who died on December 12, 1915, and by that settlement certain property was settled upon trust for the late Marquess for life with remainders over.

The specific question raised by the appeal was whether, for the purpose of determining the rate of estate duty to be paid on the property passing on the death of the late Marquess, the property comprised in this settlement ought to be aggregated with certain property of which he was tenant in tail male in possession in accordance with a settlement made by a private Act of Parliament of 1555 (2 & 3 Philip and Mary No. 22), but which he was incapable of alienating by the terms of that Act.

It was conceded that in regard to this question of aggregation certain free property which passed by the will of the late Marquess stood on the same footing as the property

(1) [1923] 2 K. B. 18.

comprised in the marriage settlement, and a second appeal to the House relating to the former property was adjourned to abide the result of the present appeal and was subsequently allowed. If all these properties were aggregated the rate of estate duty was 18 per cent., but if the parliamentary estates were excluded from aggregation the rate was 12 per cent. only.

The Inland Revenue Commissioners claimed upon the construction of ss. 1, 4 and 5 of the Finance Act, 1894, that they were entitled to aggregate the interest of the present Marquess in the inalienable estates with the other before-mentioned properties of the late Marquess.

Sankey J. affirmed the determination of the Commissioners, and his decision was affirmed by the Court of Appeal by a majority (Lord Sterndale M.R. and Younger L.J.; Warrington L.J. dissenting).

1923. Dec. 13. *W. A. Greene K.C.* (with him *Ashworth James* and *St. John Micklethwait*) for the appellant. In the case of this inalienable estate the property passing on the death of the late Marquess was under the express provisions of s. 5, sub-s. 5, of the Finance Act, 1894, the interest of his successor, and is expressly excluded from aggregation under the proviso to s. 4 by reason that the late Marquess never had an interest in it. [He referred to *In re Bolton Estates Act*, 1863. (1)] Lord Macnaghten in stating the general principles of the Act in *Earl Cowley* v. *Inland Revenue Commissioners* (2) was not addressing himself to this point.

Sir Thomas Inskip S.-G. and *Gavin Simonds* (*Sir Douglas Hogg A.-G.* with them) for the respondents. Sect. 5, sub-s. 5 cannot be read literally. The property passing on the death was the parliamentary estates themselves. An interest which does not come into existence till after the death cannot pass on the death, and the true meaning of this sub-section must be that the property passing on the death shall for valuation purposes be deemed to be the interest of the successor. The words of sub-s. 5 are words of measure and not of charge.

(1) [1904] 2 Ch. 289. (2) [1899] A. C. 198, 211.

H. L. (E.) 1924 NEVILL v. INLAND REVENUE COMMISSIONERS.

If the appellant is right a new subject matter of taxation is tucked away in sub-s. 5. There is no indication in these first five sections of the Act of any intention to except this particular kind of estate from the general scheme of aggregation.

W. A. Greene K.C. replied.

The House took time for consideration.

1924. Feb. 11. VISCOUNT HALDANE L.C. (read by LORD BLANESBURGH). My Lords, the question to be decided on this appeal is whether, in determining the rate of estate duty to be paid on the property passing on the decease of William late Marquess of Abergavenny on December 12, 1915, the property comprised in a settlement made on his marriage, of which the appellant is the surviving trustee, is to be aggregated with certain other property, of which Lord Abergavenny was tenant in tail. The latter property, which consisted of land in the county of Sussex and elsewhere, the deceased Marquess held under the terms of an old Act of Parliament (2 & 3 Philip and Mary, No. 22), passed to restore the rights of his predecessors in title which had been taken away as the result of an attainder. It is not now in dispute that this Act was the instrument which created the title of the late Marquess and his predecessors. The peculiarity of this title was that by the terms of the Act the successive owners of the land were rendered incapable of alienating it by feoffment, discontinuance, fine, recovery, or by any other act to be done or suffered by them.

When the late Marquess died the respondents claimed that the parliamentary estates were, for the purpose of calculating the rate of duty payable on his death, assessable under the Finance Act, 1894, with the property settled by the marriage settlement and with the free property of the deceased, and they accordingly assessed the duty on the marriage settlement property at the rate of 18 per cent. The appellant, having paid the duty claimed, brought the case before the King's Bench Division of the High Court of Justice, claiming that the rate of duty should have been no more than 12 per cent.

Sankey J. dismissed his application, and a majority of the Court of Appeal (the Master of the Rolls and Younger L.J.; Warrington L.J. dissenting) have affirmed the decision. The question turned, in the main, on the construction of the Finance Act, 1894.

The actual point is a narrow one. It arises over the meaning to be attached to certain words in s. 5, sub-s. 5, of that Finance Act. Their significance can hardly, however, be appreciated apart from reference to the general scheme of the Act. That scheme is that a new duty, called estate duty, is to be levied on the principal value of the property, settled or not settled, which "passes" on death. "Passes" may be taken as meaning "changes hands." The principle is contained in s. 1. Sect. 2 combines definitions of such property with the extension of the application of the principle laid down in s. 1 to certain cases which are not in reality cases of changing hands on death at all, but are to such an extent in an analogous position that it has been deemed proper in these instances to impose a similar tax. These cases are technically altogether outside s. 1. That section is concerned with all property changing hands, whether under the provisions of an instrument settling by conferring successive rights to the same property, or by virtue of the general law prescribing the succession to property. It is a change of the hands into which the property comes that is the occasion of the tax, whether the property is settled or not. What is taxed, moreover, is prima facie the value of the property itself, and not that of the interest in it which passes. Sect. 7 prescribes certain deductions from the value of the property passing (as for the debts, etc., of the deceased) which are to be allowed in ascertaining the taxable value of the property. But throughout, the general principle is the taxation of the estimated value of the property as itself passing, and not of that of any mere estate or interest in it.

Sect. 5 imposed a further estate duty, called settlement estate duty, on the principal value of settled property. This new duty was to be payable only once during the continuance of the settlement, and, if the main estate duty had already

H. L. (E.) 1924 NEVILL v. INLAND REVENUE COMMISSIONERS. Viscount Haldane L.C.

been paid, that was not to become again payable until the death of a person who during the continuance of the settlement was competent to dispose. Until the death of a person who had been so competent estate duty did not become payable when the property changed hands under the settlement. It will also be observed that this freedom from liability might in some cases continue for an indefinite time. For s. 23, which applies the Act to Scotland, provided by sub-s. 16 that the exemption during the continuance of a settlement should extend to the case of a settlement by way of Scotch entail, under which, as the law used to be, an heir of entail, although by the law of Scotland he took the complete and full fee, and not merely an estate in it, as in England, was not entitled to disentail without consents. It is therefore plain that, as a general principle, property was to be deemed to change hands not the less within the meaning of s. 1, merely because persons taking successively were debarred from power of alienation.

My Lords, so far there is no obscurity. Inalienability of the property in the hands through which it passes is not treated as a reason for excluding the dominant principle of this tax. But at the end of s. 5 there has been inserted a sub-section which, according to the appellant, introduces a special modification bearing on aggregation, and applying to the present case. Sect. 5, sub-s. 5, is in these terms: "Where any land or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty."

My Lords, it is, I think, clear that notwithstanding the declaration in general terms here that the provisions of this Act with respect to settled property shall not apply, the main

principle of these provisions as to settled property is really in some sense to apply, although in a qualified form. For there is something which is treated as passing in that sense of settled property changing hands in which s. 1 employs the word passing. Otherwise there would be no provision at all which imposed the tax. However, in this special case that something is to be taxed on the footing of being the interest of the successor, yet that only as valued in a particular way, the way of a value calculated on the basis of an annuity for the life of his successor, as in the case of succession duty.

So far there is not much difficulty. But when we turn to s. 4, which deals with aggregation, a more perplexing question arises. The general rule enacted by that section is that all property passing on the death of the deceased in respect of which estate duty is leviable is to be aggregated so as to form one estate, and the duty is to be levied at the proper graduated rate on the principal value of the aggregated amount. Up to that point there is no obscurity. In the case of a parliamentary inalienable title such as that under consideration, if the language of the section stopped here, the property passing would be all that passed into the hands of the successor, which includes his interest in it, and is thus under s. 5, sub-s. 5, to be treated as passing. But the language of s. 4 does not stop with the enactment of the rule as to aggregation referred to. It goes on to qualify the rule by a proviso that any property passing on the death of the deceased "in which the deceased never had an interest, or which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or lineal descendant of the deceased, shall not be aggregated with any other property but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof; but if any benefit under a disposition not made by the deceased is reserved or given to the wife or husband or a lineal ancestor or lineal descendant of the deceased, such benefit shall be aggregated with the property of the deceased for the purpose of determining the rate of estate duty."

H. L. (E.) 1924 NEVILL v. INLAND REVENUE COMMISSIONERS. Viscount Haldane L.C.

This provision was amended by s. 12 of the Finance Act, 1900, and by s. 16 of the Finance Act, 1907. It is now confined to property passing in which the deceased never had an interest, and in the form which governs the case before us now enacts only that any property so passing in which "the deceased never had an interest," shall not be aggregated but shall be an estate by itself.

My Lords, undoubtedly the late Marquess had an interest in his property subject to the parliamentary settlement. Undoubtedly also that property would be treated by the Finance Act, 1894, as passing if there were no other provision to be considered than that of the provision I have just quoted, and there must therefore have been aggregation. But we have to consider the effect of the further qualification superimposed by s. 5, sub-s. 5. This, which I have already cited, provides that in the case of a parliamentary and inalienable title such as that of the late Marquess, and of property passing within the meaning of this taxing Act, its provisions with respect to settled property are not to apply, and the property passing on the death of any person in possession is to be the interest of his successor, to be valued on a particular footing. What is meant by saying that the property passing is to be this interest of the successor? Does it mean that the deceased predecessor is to be treated as having had no interest which has passed? If so, aggregation will be excluded by the initial words of the proviso to s. 4, on the footing of the deceased Marquess never having had an interest in contemplation of the aggregation s. 4. What complicates the problem of construction is the looseness of the language employed in s. 5, sub-s. 5. For undoubtedly, notwithstanding what is said as to the provisions of the Act with respect to settled property not applying, they do for some purposes apply, otherwise no property would pass even to the extent of authorizing the interest of the successor to be taxed as being what has passed, and yet this is what is expressly directed to be done.

It seems true that it is by the property being treated as settled under s. 1 that this is effected. For it was only by

the operation of the parliamentary title, the enactment of this statute of Philip and Mary, that the property changed hands as it did. No general rule of law apart from what was prescribed by that statute brought about the change of title, and what was so prescribed constituted a settlement within the definition in s. 22 and in the Settled Land Act, 1882, the definition in which is expressly incorporated. That definition includes an Act of Parliament, under which land or any estate or interest in land stands limited to or in trust for any persons by way of succession. The land we are considering was therefore settled land within the meaning of s. 1, and it appears to be on that footing alone that the words of s. 5, sub-s. 5, reach it as property passing. It does not follow, because the subject matter to be taxed is to be ascertained and valued as if it were the interest of the successor, that the property is not to be deemed to pass under a settlement. Putting s. 5, sub-s. 5, for the moment out of account, and looking at s. 1 and the definition section, this is settled property which would normally be taxed as being such. It would have been freed temporarily by the payment of settlement estate duty, while the settlement continued to exist, from further payment of estate duty, until the death of a person competent to dispose. That this should be so even in the case of property that remains indefinitely under settlement because it cannot be alienated, the scheme of the Act contemplates, as the reference to entails in Scotland shows. We have therefore to choose between two constructions of s. 5, sub-s. 5, a sub-section apparently inaccurately worded in any view of its meaning. According to one construction the general scheme of the Act is thrown overboard in such cases as that before us, and a new and special form of taxation for the purposes of estate duty is introduced. According to an alternative reading of the words the general scheme remains, but the provisions of the Act as to settled property are to a limited extent so far departed from as regards the amount of what is to be taxed, that although the actual property in possession of the deceased is treated as passing, and is expressly described as such, that upon which the tax

H. L. (E.) 1924 NEVILL v. INLAND REVENUE COMMISSIONERS. Viscount Haldane L.C.

is to be levied is not to exceed the interest of the successor specially valued.

My Lords, the question is a difficult one on which there may well be divergence of opinion. What weighs with me is, firstly, the untruth in point of fact of the assumption that has to be made, in order to satisfy the words of the proviso to s. 4, that the deceased never had an interest, and, secondly, the character of the general scheme of the Act itself, and the unlikelihood of an intention to depart from it radically which has not been indicated by clear language. The second of the alternative constructions to which I have referred provides for both of the difficulties I feel, and appears to me to do no more violence than the first to words in s. 5, sub-s. 5, which undoubtedly require exegesis. I find myself, on the balance of the argument, preferring the interpretation of the words in question which treats them as meaning only that the property passing in such a case as this is deemed, but merely for the purposes of the tax, to be the interest specially valued. "Shall be" is thus read as meaning "Shall be deemed to be," an expression familiar elsewhere in the Act, as in s. 2, where it is employed to amplify the ordinary meaning of passing. With Younger L.J. I attach some importance to s. 44 of the Finance Act, 1922, as indicating this as the true interpretation. It is because I think that the construction suggested is a more natural one, having regard to the Act, read as a whole, and does no real violence to the words used, that I have come to the view that the conclusion reached in the Courts below was the right one.

VISCOUNT CAVE (read by LORD DUNEDIN). My Lords, this appeal raises a question as to the amount of estate duty payable on the death of the late Marquess of Abergavenny, who died on December 12, 1915.

The property which changed hands on the death of the late Marquess was of three kinds—namely, (*a*) free property which passed under his will, (*b*) property included in a marriage settlement of which the appellant is the sole surviving trustee and under which the Marquess was tenant for life, and

(*c*) lands and other property settled (as is now admitted) by a statute (2 & 3 Philip and Mary No. 22) upon Edward Nevill and his heirs male and of which the Marquess was tenant in tail male. This statute contained a provision preventing any of the persons entitled in succession in tail from alienating the settled property.

The Commissioners of Inland Revenue in assessing the property to estate duty determined that under the provisions of s. 4 of the Finance Act, 1894, the above property marked (*a*) and (*b*) ought to be aggregated with the interest of the successor of the late Marquess in the property marked (*c*); but this contention was disputed by the appellant and the other persons interested on two grounds. First, they contended that the property marked (*c*), sometimes referred to as the Eridge Estate, had been settled not by the statute of Philip and Mary but by an earlier disposition—namely, the will of the 32nd Baron Abergavenny dated June 4, 1535, and on that ground was exempt from aggregation under the provisions of s. 12 of the Finance Act, 1900, and s. 16 of the Finance Act, 1907. And secondly, they claimed that, if the Eridge Estate had been settled by the statute of Philip and Mary, it was by that statute made inalienable and was, therefore, exempt from aggregation under s. 5, sub-s. 5, of the Finance Act, 1894, and the proviso to s. 4 of the same Act. Both contentions were overruled by the Commissioners; and on appeal their decision was affirmed by Sankey J., and afterwards by the Court of Appeal, Warrington L.J. dissenting. Thereupon the present appeal was brought. On the appeal to this House the appellant abandoned the first of his two contentions above mentioned, and accordingly it is the second contention alone which has to be considered.

The question turns on the construction of ss. 1, 4 and 5 of the Finance Act, 1894. By s. 1 it was provided that in the case of every person dying after August 1, 1894, there should be levied upon the principal value of all property, real or personal, settled or not settled, which passed on the death of such person a duty called "Estate Duty" at the

H. L. (E.) 1924 — NEVILL v. INLAND REVENUE COMMISSIONERS. — Viscount Cave.

graduated rates mentioned. Sect. 4 provided that for determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty was leviable should be aggregated so as to form one estate and the duty should be levied at the proper graduated rate on the aggregate principal value; but it was provided that (among other things) any property so passing in which the deceased never had an interest should not be aggregated with any other property, but should be an estate by itself, and the estate duty should be levied at the proper graduated rate on the principal value thereof. Sect. 5 of the Act provided that where property in respect of which estate duty was leviable was settled by the will of the deceased, or having been settled by some other disposition passed under that disposition on the death of the deceased to some person not competent to dispose of the property, a further estate duty (called "Settlement Estate Duty") on the principal value of the settled property should be levied at the rate specified in the Act; but the section provided that during the continuance of the settlement the settlement estate duty should not be payable more than once, and also that if estate duty had already been paid in respect of any settled property since the date of the settlement the estate duty should not be payable in respect thereof until the death of a person competent to dispose of the property. Sub-s. 5 of the same section, upon which this appeal mainly turns, was as follows: "(5.) Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty."

In this case the appellant contended that, having regard

to s. 5, sub-s. 5, of the Act, the property passing on the death of the late Marquess was as regards the estates settled by the Act of 2 & 3 Philip and Mary not the estates themselves but the interest in those estates taken by the successor of the late Marquess, and that as the late Marquess never had an interest in that succession, the value of the succession is under the proviso to s. 4 not to be aggregated with any other property, but to be treated as an estate by itself. On the other hand, the Commissioners determined and the Court of Appeal has held that s. 5, sub-s. 5, must be read as a provision as to valuation only and has no effect upon the operation of s. 4 as regards these estates.

My Lords, I am unable to share the view of the majority of the Court of Appeal that s. 5, sub-s. 5, deals with valuation and valuation only; and it appears to me that such a restricted interpretation of the sub-section is inconsistent both with its purpose and with its language.

The purpose of the sub-section is reasonably plain. The provisions of the first four sub-sections of s. 4 did not fit the case of property settled and made inalienable by Act of Parliament or Royal Grant; for in the case of such property the effect of those sub-sections would have been that estate duty and settlement estate duty would have been paid once only upon its full value, and that at all times thereafter it would have been immune from the charge of further estate duty. Accordingly, it is provided by the first part of sub-s. 5 that as to lands or chattels so rendered inalienable "the provisions of this Act with respect to settled property shall not apply." I read these words as meaning, not that the provisions of the Act relating to all property whether settled or unsettled (such as s. 1 of the Act) shall not apply to the property in question, but that the provisions relating to settled property only or to settled property as such shall not so apply; and if the Act is examined, it will be found that the substantial effect of such a provision is to exclude sub-ss. 1 to 4 of s. 5. In any case it is clear that this part of the sub-section deals with something more than valuation.

The inalienable property having thus been excluded from

H. L. (E.) 1924 NEVILL v. INLAND REVENUE COMMISSIONERS. Viscount Cave.

the operation of sub-ss. 1 to 4, it was necessary to make some different provision for charging it with duty; for it would not have been just to subject it on every devolution to estate duty on the full principal value of the property. Accordingly by the second part of sub-s. 5 it is provided that in the case of such property "the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels." I cannot read this as a provision relating to valuation only. No such limitation is to be found in the words of the enactment; and to read such a limitation into the sub-section appears to me to be not only unnecessary but destructive of its purpose. The inalienable property having been excluded by the first part of the sub-section from the provisions of sub-ss. 1 to 4—under which other settled property, while it was subjected to an additional estate duty, was freed from the recurrence of the charge of estate duty so long as the settlement lasted—it was obviously necessary to modify in some other way the operation of the charging sections so as to protect property of this character from an overwhelming burden; and the course adopted was, while leaving the property subject to estate duty on every devolution, to reduce the amount of the charge by levying it not on the value of the property itself (the lands or chattels settled), but on the value of the interest taken by the successor in such property. Thus it is enacted that the property passing on the death of any person in possession of the lands and chattels "shall be," that is to say, shall for the purposes of the Act be deemed to be, the interest of the successor. This is not a provision as to valuation, but a substitution for the property itself of a new taxable subject —namely, the successor's interest in the property; and the manner in which this new taxable subject is to be valued is determined, not by the words now under consideration, but by the third branch of the sub-section which provides that "such interest shall be valued, for the purposes of estate duty, in like manner as for the purposes of succession duty."

An argument against this reading of s. 5, sub-s. 5, was

founded upon s. 44 of the Finance Act, 1922, where property settled by Act of Parliament or Royal Grant is referred to as "passing" on the death of a person in possession of it; but I agree with Warrington L.J. in thinking that the word "passing" is there used in its ordinary or dictionary sense, and not as indicating a "passing" for the purposes of the Finance Act, 1894. In any case, an expression in an Act of 1922 cannot be relied upon as affecting the construction of the Act of 1894.

I conclude then that the effect of s. 5, sub-s. 5, of the Act of 1894 is to substitute for all the purposes of that Act the interest of the successor in the property in question for the property itself. If so, then the substitution must be made, not only for the purposes of s. 1 of the Act, but also for the purposes of s. 4. But for the proviso to that section, the interest of the successor in the inalienable property would under the earlier part of the section be aggregable as "property passing on the death of the deceased" with the other property so passing. But by the proviso any "property so passing in which the deceased never had an interest" is exempted from aggregation; and as the deceased, although he undoubtedly had an interest in the inalienable property itself, never had or could have had an interest in his successor's estate, the inference appears to be irresistible that the property escapes from aggregation under the provisions of s. 4, and is to be treated as an estate by itself. It may well be that this result was not foreseen by the framers of ss. 4 and 5 of the Act, but in construing a taxing Act regard must be had not to what one might expect to find in the Act but to the words of the Act themselves; and if in this case due regard is had to the words of the statute, I see no escape from the conclusion for which the appellant contends —namely, that as regards the estates settled by the Act of Parliament estate duty is to be levied only on the value of the interest of the successor to those estates, and that such interest is not to be aggregated with the other property passing on death but is to be treated as an estate by itself.

H. L. (E.) 1924 — NEVILL v. INLAND REVENUE COMMISSIONERS.

For these reasons I am of opinion that this appeal should succeed, that the order of the Court of Appeal should be set aside and an order be made in accordance with the prayer of the appellant's petition, and that the appellant should have his costs of the appeals to the Courts below and to this House.

LORD PARMOOR (read by LORD ATKINSON). My Lords, I agree in the conclusion at which Warrington L.J. arrived and can state my reasons shortly. Sect. 5, sub-s. 5, of the Finance Act, 1894, appears to me to enact, quite clearly, that where the property, passing on the death of any person in possession of the lands and chattels, is property settled by Act of Parliament, and no one of the persons successively in possession is capable of alienating the same, then, for the purpose of estate duty, such property shall be the interest of his successor in the lands and chattels. I can see no difficulty in the substitution of the interest of the successor, for the property which changes hands on the death of the person in possession, as the taxable subject for purposes of estate duty. An interest in property cannot be valued in the same way as the property itself, and the sub-section therefore provides that the interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty. This sub-section directly applies to the estates of the late Marquess of Abergavenny, which he held under a parliamentary settlement, and which he was not able to alienate.

Sect. 4 of the Finance Act, 1894, is the section which enacts generally that for determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof. If this general provision of s. 4 is applicable to the property, settled as inalienable property by Act of Parliament, which passed on the death of the late Marquess of Abergavenny, then this property would fall to be aggregated with the funds under the marriage settlement

of the late Marquess, and the appellant, who is trustee under that settlement, could not succeed.

The appellant relies on the proviso to s. 4. This proviso enacts that any property passing on the death of the deceased, in respect of which estate duty is leviable, in which the deceased never had an interest, shall not be aggregated with any other property, but shall be an estate by itself and the estate duty shall be levied on the proper graduated rate on the principal value thereof. In the case of inalienable property, settled by Act of Parliament, the interest of the successor is under the provisions of s. 5, sub-s. 5, substituted as the taxable subject, and the property which changes hands on the death of the deceased is, for the purposes of estate duty, the interest of the successor to be valued in the prescribed manner. In this substituted taxable subject the deceased has never had an interest, and consequently there is no aggregation between the value of the funds settled on the marriage of the deceased and the value of the interest of his successor in the inalienable property settled by Act of Parliament.

The appeal depends wholly on the construction of the relevant sections of the Finance Act, 1894. If the language used in a Finance Act is capable, having regard to its context, and to the general purposes of the Act, of being construed in the ordinary natural sense of the words, then no different principle is applicable to its construction from that applicable to any other Act of Parliament.

If it be permissible to say more, I would add that, in my opinion, it would lead to illogical and uncertain results to attempt to aggregate, under one principal value, a value partly derived from the valuation of actual property, and partly derived from the valuation of the interest of a successor. This latter valuation depends on a calculation which would vary in accordance with the probable duration of the successor's interest and has no fixed relation to the actual value of any other properties changing hands on the death of the deceased.

My Lords, in my opinion the appeal should be allowed with costs here and below.

H. L. (E.) 1924 — NEVILL v. INLAND REVENUE COMMISSIONERS.

LORD PHILLIMORE. My Lords, the scheme of the Finance Act, 1894, seems to be this. First of all, when a man dies, a graduated estate duty is to be levied upon the property passing on the death of the deceased. Secondly, it is to be levied on property which does not pass on his death, but which by his death is either in some way set free or altered in its course of destination. This property is for the purposes of the Act to be deemed property passing on the death. Thirdly, for the purpose of determining the rate of estate duty, all property in respect of which estate duty is leviable is with two exceptions (one of them since repealed) to form a mass or be aggregated so as to obtain the largest possible sum for the graduated scale.

Then follows in s. 5 special provisions with regard to estates either settled by the will of the deceased or passing at his death under some other previous disposition to some person not competent to dispose of the property. These provisions now repealed were, on the whole, for the ease of settled property. An immediate additional duty called settlement estate duty was to be paid on the occasion of the first succession, and then no further estate duty was to be paid till the property got into the hands of some one competent to dispose of it.

These provisions led to the consideration of the special case of estates settled by Act of Parliament or Royal Grant in such a manner that, whether each possessor was tenant for life or tenant in tail, he could not alienate, so that the property never will come into the hands of a person competent to dispose of it. And thereupon the provision in sub-s. 5 of s. 5, which is one that balances the interest of the Crown and the taxpayer, was passed: that, in such cases, "the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty." The result thus obtained removes this piece of taxation into a

different class. No longer is it the question to be considered how much has deceased died worth, and how much toll shall the Crown take of that which his death sets free, but what is the value, to the immediate successor, of the property which the death has set free. In other words, my Lords, the taxation method of the Succession Duty Act instead of that of the old Probate Act is brought into play.

For this purpose the taxable unit is no longer measured by the simple process of estimating the capital value of the property set free, but is a compound figure of which one of the factors is the value to the immediate possessor and will vary according as he is young or old.

Your Lordships have now to determine whether this interest of the successor is to be deemed property passing on the death of the deceased in respect of which estate duty is leviable and is therefore to be aggregated, or whether it forms an estate by itself. It is agreed on all hands, that if this interest is to be aggregated, it is to be reckoned as an interest at its value to the immediate successor and not as property in the sense of physical assets, of which the actual value is to be brought into account.

If this be so, the word "property" in the first part of s. 4 would have to include two different things, the physical property taxed by ss. 1 and 2 and the special interest of a successor under the conditions of s. 5, sub-s. 5. This—though the mode of arriving at it is somewhat clumsy—may yet be the case; but then your Lordships have to consider whether this property does not fall under the exception in the proviso of the fourth section "property so passing" (that is property passing on the death) "in which the deceased never had an interest." For it is contended that if the property here so spoken of is not the physical asset but the interest of the successor, that is a property in which the deceased had no interest.

This argument has not appealed to Sankey J., or to the Master of the Rolls, or to Younger L.J. (the present Lord Blanesburgh), who have decided in favour of the Crown

H. L. (E.) 1924

NEVILL v. INLAND REVENUE COMMISSIONERS.

Lord Phillimore.

and said that this interest of the successor should be aggregated. Warrington L.J. has taken the opposite view.

All the learned judges agree that we must begin by considering sub-s. 5. The first limb, as the learned judges have called it, of the enactment of this sub-section lies in the words "the provisions of this Act with respect to settled property shall not apply." It has been suggested that the effect of these words is to take the succession to these estates out of the taxation imposed by s. 1, because that section taxes all estates, and among others, settled estates. My Lords, I think that this suggestion, which was somehow thought to be in favour of the Crown, is not substantiated. I see that Younger L.J. (Record, p. 47 B), thinks that "provisions of this Act" means provisions of this section, and I think that counsel at your Lordships' Bar on both sides agreed to this. At any rate, it is my view. If there were a statute regulating the duties of all men, with some sections imposing special duties on, or giving special rights to, black men, and another section were to provide that the provisions of this Act with regard to black men should not apply to the natives of Jamaica, it could not be considered for a moment that the general provisions of the Act could not apply to those natives. This being so, there is nothing difficult of construction and nothing requiring emendation or addition in this first limb. The observation is important, because the Master of the Rolls took a different view (p. 30 G), and therefore was led, in the picturesque words of Sankey J. (Record, p. 20 A), "to leave the safe anchorage of a literal construction."

There is really no difficulty. The first limb says that the special provisions relating to settled property (that is the earlier sub-sections of s. 5) are not to apply. There is to be no demand of settlement estate duty; there is to be no subsequent exemption from estate duty.

Now, I come to the second limb: and "the property passing on the death of any person in possession of the lands . . . . shall be the interest of his successor in the lands."

This is a provision which should have some meaning given to it, if possible.

It is followed by a third limb providing for the valuation of the successor's interest.

The contention of the Crown is that the second and third limbs together constitute a valuation provision and no more. This seems to give no force to the second limb. I think that force can be given to it. I shall best explain my idea by putting forward a suggestion which I made in the course of the argument. The words " property passing on the death " constitute one compound subject just as if they were all inside an algebraical bracket. You will get the idea if you put them in inverted commas. Question: What is in this sub-section " the property passing on the death " ? Answer: The interest of the successor. This limb of the sentence is the taxing part. The passage is compendious. The expression is harsh. But the object is attained. The interest of the successor calculated according to the third limb of the sentence is substituted for the property. If so, the argument for the appellant should prevail.

My Lords, it has been suggested that this result will be accidental and will not have been intended. I am not so sure. If you once introduce a new measure of arriving at the value of an item to be aggregated, you subject the other persons who benefit upon the testator's death to a scale of taxation which depends in part upon the capricious element of the age of one of the successors.

Again, in the Act of 1894 (though the provision has since been repealed) there was excepted from aggregation property which under a disposition not made by the deceased would pass to collaterals. It might well have been contemplated that in the case of these ancient estates it would often occur that the successor would be a perhaps distant collateral, and that it would be imposing an undue burden on the daughters of the last proprietor to enact that the scale on which their fortunes were taxed should be affected by the fact that the parliamentary estate descended to a youthful distant cousin. My Lords, I think that this appeal should be allowed.

H. L. (E.) 1924 NEVILL v. INLAND REVENUE COMMISSIONERS.

LORD DUNEDIN. My Lords, my noble and learned friend Lord Sumner desires me to say that he concurs in the judgment which I read of my noble and learned friend Lord Cave.

Order of the Court of Appeal reversed, and judgment entered for the appellant in the terms of the prayer of his petition. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Feb. 11, 1924.

Solicitors for the appellant: *Williams & James.*

Solicitor for the respondents: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1924 *Feb.* 11.

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY, LIMITED . . . } APPELLANTS;

AND

PACIFIC STEAM NAVIGATION COMPANY . . . . . } RESPONDENTS.

Distinguished. HARVEY v. ROAD HAULAGE EXECUTIVE [1952] 1 K.B. 120

Shipping—Collision—Negligence—Contributory Negligence—River Navigation—Vessel being towed out of graving Dock in River—Clyde Navigation By-laws.

By r. XIX. of the Clyde Navigation By-laws: "Every steam vessel, under her own steam, crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river."

The *Bogota*, a steamer 415 feet in length, was being towed stern first by a tug out of a graving dock on the Clyde, at a point where the river is barely 500 feet broad, preparatory to proceeding up stream. She had steam in her boilers, but was not using it. When she was two-thirds

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* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, and LORD BLANESBURGH.

of her length out of the dock and slanting across and down the river the *Bogota* sighted, some three-quarters of a mile away, the steamship *Alconda* coming up the river under her own steam with two tugs attached. The *Bogota* and her tug gave four short blasts, which were repeated, as a warning that the river was blocked, and continued their manœuvre. The *Alconda*, however, held on her course, and in attempting to pass between the *Bogota's* tug and the bank, struck the tug while the latter was still about 100 feet from the bank, with the result that the tug was forced back on the *Bogota*, and all three vessels were damaged:—

Held, that the *Alconda* was solely to blame for the collision, first, because in the circumstances the *Bogota* was not contravening r. XIX. of the Clyde Navigation By-laws; secondly because, assuming that the *Bogota* had contravened the rule, the collision was caused by the subsequent and independent fault of the *Alconda* in holding on her course and attempting to pass the *Bogota* after she had been warned that the river was blocked.

Interlocutor of the Second Division of the Court of Session in Scotland 1923 S. C. 526 affirmed.

APPEAL against an interlocutor of the Second Division of the Court of Session in Scotland (1) varying an interlocutor of the Sheriff Substitute.

The action was brought by the respondents, the owners of the steamship *Bogota*, in the Sheriff Court at Glasgow against the appellants, the owners of the steamship *Alconda*, in respect of a collision which occurred in the Clyde on December 9, 1921, while the *Bogota* was being towed stern first out of a graving dock on the Clyde.

The facts are fully stated in the opinion of Lord Dunedin and are summarized in the headnote.

The Sheriff Substitute found that both vessels were equally to blame for the collision.

The respondents appealed.

The Second Division by a majority (The Lord Justice-Clerk (Alness), Lord Hunter and Lord Anderson; Lord Ormidale dissenting) held that the *Alconda* was alone to blame and remitted the cause to the sheriff.

1923. Nov. 26, 27. *Condie Sandeman D.F.* and *Bateson K.C.* (of the English Bar) (with them *W. G. Normand* (of the Scottish Bar) and *Alfred Bucknill* (of the English Bar)) for the appellants. The *Bogota* was under r. XIX. and not

(1) 1923 S. C. 526.

H. L. (Sc.) 1924

ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO.

under r. III. That being so, it was her duty to keep out of the way of the *Alconda*, and she failed to do so. If no rule applies good seamanship requires that the *Bogota* should not enter the river and cross the course of an approaching vessel navigating up the river. [They cited *Mackay* v. *Dick* (1); *The River Derwent* (2); *The Schwan* (3); *The Broomfield*. (4)]

Macmillan K.C. and *John Carmont* (both of the Scottish Bar) for the respondents. Neither of the rules applies because this was a special case of a vessel being extricated from a dock; it was not an ordinary case of manœuvring in a river. Rule XIX. is a rule for navigation and is not adapted to this particular operation. The *Bogota* was not in fact emerging under her own steam within the meaning of the rule, and she gave clear notice that the channel was being obstructed. Assuming that there has been a breach of the rule by the *Bogota*, it must be further shown that the breach contributed to the accident in a material sense. Here the effective cause of the accident was the attempt of the *Alconda* to pass the *Bogota* after being warned that the river was blocked. [They cited *Admiralty Commissioners* v. *S.S. Volute* (5); *The Whitlieburn* (6); *The Raithwaite Hall*. (7)]

Condie Sandeman D.F. in reply cited *S.S. Mendip Range* v. *Radcliffe*. (8)

The House took time for consideration.

1924. Feb. 11. LORD DUNEDIN. My Lords, the screw steamer *Bogota*, a ship 415 feet long, had to leave the Elderslie Graving Dock where she had been lying in order to proceed up the Clyde to Prince's Dock. The Elderslie Dock is situate on the north bank of the Clyde, and enters the river at an angle westward of about 30°. The total width of the river ex adverso of the dock is about 500 feet. The operation of leaving the dock took place at 4.40 P.M.

(1) (1881) 6 App. Cas. 251; 8 R. (H. L.) 37.
(2) (1891) 7 Asp. M. L. C. 37.
(3) (1889) 6 Asp. M. L. C. 409.
(4) (1905) 10 Asp. M. L. C. 194.
(5) [1922] 1 A. C. 129.
(6) (1900) 9 Asp. M. L. C. 154.
(7) (1874) 2 Asp. M. L. C. 210.
(8) [1921] 1 A. C. 556.

on December 9, 1921. At that time there was lying moored immediately to the westward of the entrance to the dock a screw steamer *War Afridi*. The *Bogota* left the dock stern first; her steam was up, but she was not propelled by her own screw. A tug, the *Samson*, was attached to her stern with a tow rope of about 12 feet long and pulled her out. She was attached forward by hawsers to blocks on each side of the dock, which hawsers were paid out as she proceeded. The intention of the manœuvre was, so soon as she got clear of the dock, to attach another tug to her bow and then when she was straightened to tow her up the river proceeding along the south bank to Prince's Dock. At this time there was a flood tide running at about two miles an hour. After making certain signals, which will be more particularly set forth hereafter, she had proceeded so far with the manœuvre that her stern was a little over 100 feet from the south bank, she lying still unstraightened and athwart the stream, when a steamer, the *Alconda*, which was proceeding up the river, came into collision with the tug *Samson*, inflicting damage and knocking it against the stern of the *Bogota*, which was in consequence injured. The effect of the blow was further to slew the stem of the *Bogota* against the *War Afridi*, causing injury to both vessels. The *Alconda* herself was also injured. Cross-actions of damages were raised by the *Bogota* and the *Alconda* in the Sheriff Court of Glasgow. The learned Sheriff Substitute, before whom the case depended, after proof led, pronounced an interlocutor, finding both vessels at fault, and apportioning the damage equally between them. Appeal was taken to the Second Division of the Court of Session, when a majority of the Court recalled the interlocutor, and found the *Alconda* alone to blame. Lord Ormidale dissented, agreeing with the Sheriff Substitute. Appeal has now been taken to your Lordships' House by the owners of the *Alconda*. They admit fault, but pray that the interlocutor of the Sheriff Substitute should be restored.

As your Lordships are aware, a case of this sort is regulated by the fortieth section of the Judicature Act, which requires the Division of the Court of Session, before whom the case,

H. L. (Sc.). 1924 ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO. Lord Dunedin.

originating in the Sheriff Court in which proof has been led, depends, to pronounce specific findings of fact and findings of law, and prescribes that on appeal to this House the findings of fact must be regarded in the same manner as a special verdict by a jury and not open to review, review being confined to the findings in law alone. The effect of these provisions has been explained in your Lordships' House on more than one occasion and notably in *Mackay* v. *Dick* (1); *Shepherd* v. *Henderson* (2); *Caird* v. *Sime* (3); and *Gilroy, Sons & Co.* v. *Price & Co.* (4)

It is unnecessary to repeat what was there said, but I will add this, as I do not find it explicitly mentioned. It is not legitimate to extract a new finding of fact from the opinions of the judges, although it is legitimate to use those opinions to explain, if necessary, any ambiguity in the findings of fact. The result is that we are bound in this case to take the facts as set forth in the interlocutor of the Second Division. At the same time, as pointed out by Lord Atkinson, in *Herbert* v. *Samuel Fox & Co.* (5), we are not bound to take as a finding of fact a finding which is called a finding of fact, but which in reality is a finding of law or of mixed fact and law. I accordingly turn to the interlocutor to see what are the facts upon which the case falls to be decided. I need not read them all, because many of them just set forth in distinct propositions the narrative which I have already given, but the crucial findings which are not covered by my narrative are as follows: "(8.) That about 4.40, no vessels being in sight, either coming down or going up, the *Bogota* gave three short blasts with her whistle, and the *Samson*, having replied with similar three short blasts, proceeded to tow the *Bogota* out of the dock stern first and that these blast signals were repeated by both vessels after the *Bogota* had been drawn half way out of the dock; (9.) that the *Bogota* did not give a prolonged blast of the whistle before leaving the graving dock as prescribed by Rule 18 of the Byelaws and Regulations

(1) 6 App. Cas. 251.
(2) (1881) 7 App. Cas. 49.
(3) (1887) 12 App. Cas. 326.
(4) (1892) 20 R. (H. L.) 1.
(5) [1916] 1 A. C. 405, 413.

of the Clyde Navigation Trustees, but that the failure to give such a blast had no bearing on the collision which subsequently took place; (10.) that the movement of the *Bogota* was hampered (*a*) by the presence of the *War Afridi*, a large vessel, which was moored to the quay just outside the dock entrance with her head pointed to the east and (*b*) by the flowing tide which operated more and more strongly upon her as she gradually came out of the dock, and had a tendency to throw her stern to the south and her bow towards the bow of the *War Afridi*; (11.) that when the *Bogota* was about two-thirds out of the dock and the stern of her tug *Samson* was about mid-channel, the defenders' vessel, *Alconda*, a steamer 381 feet over all in length, under her own steam and with two tugs attached, one ahead and one astern, was seen rounding the bend of the river below Renfrew Ferry about three-quarters of a mile away; (12.) that when the *Bogota* sighted the *Alconda* she gave four short blasts of her whistle, which were repeated by the tug *Samson*, thereby indicating to approaching vessels that the river was blocked and that, as the *Alconda* came on, the four-blast signal was repeated by both the *Bogota* and the tug *Samson*; (13.) that having thus given warning to vessels, including the *Alconda*, the *Bogota* was, in the circumstances, and particularly in view of the extent to which her manœuvre had been conducted, entitled to continue and complete her movement of quitting the dock and straightening herself in the Channel; and that she was not bound to hold on, in the position to which she had attained, till the *Alconda* had passed; (14.) that the *Samson's* bow was almost directly astern of the *Bogota*, but slightly towards the port quarter, her bow being only 12 feet from the *Bogota's* stern and that she was doing her utmost to keep the stern to the north against the influence of the tide; (15.) that while these operations were going on, the *Alconda* with her two tugs was coming up the river at a speed of at least six miles an hour and that she observed a light in mid-channel when she was about Renfrew Ferry, this light being the stern light of the *Samson*; (16.) that she was continuing on her course when her pilot sighted the hulls

H. L. (Sc.) 1924 ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO. Lord Dunedin.

of the *Bogota* and *Samson* about three or four ship-lengths ahead, and about the same time the master heard a four-blast whistle (which the pilot also heard but took to be a three-blast whistle) and that in reply to the master's inquiry the pilot explained that on the Clyde it meant 'I am blocking the river'; (17.) that, notwithstanding, the pilot thought that he could pass to the south of these vessels, and accordingly ported his helm, blew one blast of his whistle and attempted to pass; (18.) that in doing so he collided at about 4.45 P.M. with the *Samson*, the bow of the *Alconda* striking her port quarter, forcing her back on the *Bogota's* rudder, which fortunately was hard-a-port at the time and so acted to some extent as a buffer, but that the *Bogota* was forced back upon the *War Afridi*, with the result that all four vessels were damaged; (19.) that the collision occurred about 100 feet from the south bank, and that the *Alconda* could have manœuvred in safety to within 50 feet of that bank; (20.) that the *Samson*, from the position in which she was, could not do anything to escape the collision and was at the time doing her utmost to keep the *Bogota's* stern to the north against the tide, in conformity with her orders from the *Bogota*; (21.) that if the *Alconda* had stopped, or held back, as she might have done, when she saw the stern light in mid-channel, or even when she first saw the hulls of the vessels outside the graving dock and heard the four- or three-blast signal, the accident would not have occurred; (22.) that there was fault on the *Alconda's* part in not so stopping or slackening speed and that there was no fault on the part of the *Bogota*; and (23.) that the collision was due solely to the fault of the *Alconda*."

It should be explained that the expression "hold on" in the thirteenth finding clearly appears from the judgments of the learned judges to be used as meaning arrest her further movement into the river by stopping the tug and ceasing to pay out the cables still attaching the *Bogota* to the dock, helped perhaps by a forward turn of her own screw.

My Lords, it is true that the said thirteenth finding, which is the foundation of the judgment, may be read as not a

true finding of fact, but as a determination in law of the result arising from the circumstances of the collision. In that sense it is not binding on your Lordships. But it includes in my view an underlying finding of fact—namely, that the *Bogota* had already so invaded the other channel that it was difficult for her to stop her manœuvre. The appellants, as I have already mentioned, admitted fault, so that the sole question to be decided is whether the collision was due to the sole fault of the appellants or whether any fault of the respondents contributed thereto. There are certain by-laws and regulations of the Clyde Trustees published to regulate the river traffic, which must be here set forth. The by-laws have not the force of statute, but like the rules of the road they form a rule of conduct, so that an infringement of them would be held to be in law a fault which, if it led to damage, would infer liability.

The rules quoted at the trial are as follows :—

"III. When a steam vessel or a dredger is turning round, or for any reason is not under command and cannot get out of the way of an approaching vessel, which, but for this it would be her duty to get out of the way of, or when it is unsafe or impracticable for a steam vessel, or dredger, to keep out of the way of a sailing vessel, she shall signify the same by four or more blasts of the steam whistle in rapid succession, or by like strokes of her bell, and it shall be the duty of the approaching vessel to keep out of the way of the steam vessel or dredger, so situated."

"XIX. Every steam vessel, under her own steam, crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river."

Now the case of the appellants is this. They say that the *Bogota* transgressed r. XIX. and was not excused by r. III. The respondents argue that r. XIX. did not apply, but that if it did r. III. provided the excuse. They also say that apart from r. III. there is in the circumstances no liability. Now it may be doubted whether r. XIX. was intended to apply to such a manœuvre as was here going on. But the terms in which it is expressed raise a question of much difficulty. It

H. L. (Sc.)
1924
ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO.
Lord Dunedin.

would indeed be well if the rules were revised so as to remove doubts on the matter. As it is, I do not think it is necessary to decide it. I will assume without deciding that r. XIX. did apply. But what does it mean? The appellants have read it as if "keep out of the way" meant a duty which was necessarily infringed if, in any circumstances whatever, there was collision. This can scarcely be so. Supposing a vessel had begun to cross towards the other side, and another vessel left its proper water and collided with the first vessel, while in its own water. Could it possibly be said that there was fault on the part of the first vessel? I think, therefore, that "keep out of the way" must be interpreted as "do not get into the way of," and whether that duty is contravened will always depend on the circumstances. Now here we have the fact, as shown in the eleventh finding, that when the *Alconda* was sighted the *Bogota's* tug had invaded the south channel, and in finding 12 that the signal was given for blocking the river. I therefore think that the respondents succeed on two grounds—first, that r. XIX. was not really broken, and second, that if it was broken by invasion of the south channel the fault which really caused the collision was the subsequent and independent fault of the *Alconda*. I have had the opportunity of reading the judgment to be delivered by my noble and learned friend, Lord Shaw, and concur entirely in what he says as to this aspect of the case.

I would add that if the facts were open to me I should hold that in my view the *Bogota* was excused under r. III. She did sound the four blasts. It is, I think, clear that r. III., where there is scope for its application, will override r. XIX., for as it itself states it is meant to apply just when but for it there would be a duty to get out of the way of an approaching vessel. There was argument as to the question of whether the *Bogota* was turning round. I do not think she was turning round, but that, in my view, is immaterial, because I read the words "and cannot get out of the way" as qualifying both the words "turning round" and the words "or for any reason is out of command." I am not entitled to make any finding that the *Bogota* was unable to get out of the way, and

I cannot extract this proposition from any of the findings by which I am strictly bound.

On the whole matter I am of opinion that the appeal must be dismissed with costs.

LORD ATKINSON. My Lords, I approve, and will support the motion made by my noble friend on the Woolsack.

Taking, as I am bound to do, the findings of fact in this case by the Sheriff Substitute as unassailable there are in my view several grounds upon which the correctness of the judgment appealed from may be questioned. I propose only to deal with one of these grounds and to rest my judgment upon it—namely, the applicability to this case, on the facts found by the sheriff, of the principle upon which the decision of the case of *Davies* v. *Mann* (1) rested. That principle is, I think, this, that in order that a defendant should sustain a plea of contributory negligence he must establish that he himself could not by the exercise of reasonable care and diligence have avoided the consequences of the plaintiff's negligence : *Tuff* v. *Warman*. (2) For the purpose of testing the applicability of this principle to the present case, I assume, of course, that the *Bogota* transgressed one or more of the Clyde rules and was guilty of negligence in getting with her tug the *Samson* into the position in which they were when the collision took place. In Marsden on Collisions, 5th ed., p. 17, it is laid down on the authority of the cases mentioned in the notes, to some of which I shall presently refer, "that there is no difference between the rules of law and of Admiralty as to what amounts to negligence causing collision ; and that, before a vessel can be held to be in fault for a collision, negligence causing or contributing to the collision must be proved," and that in the case of a collision a ship though guilty of negligence will not necessarily be held to blame if the ship with which she collides could by the exercise of reasonable and ordinary skill and care have avoided the collision. In the case of *Cayzer & Co.* v. *Carron Co.* (3), which closely resembles the

(1) (1842) 10 M. & W. 546. (2) (1858) 5 C. B. (N. S.) 573.
(3) (1884) 9 App. Cas. 873, 883.

H. L. (Sc.) 1924

ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO.

Lord Atkinson.

present case and is directly in point, Lord Blackburn assumes apparently that the principle of *Davies* v. *Mann* (1) applied. In that case a collision occurred in the Thames between two ships named respectively the *Clan Sinclair* and the *Margaret*. The former ship had transgressed one of the statutory rules and regulations framed to regulate navigation on that river. This rule required that in circumstances such as existed at the material times the *Clan Sinclair* should have waited at a certain point in the river until the other ship, the *Margaret*, had passed up the stream. She did not ease and wait, as she ought to have done, and was guilty of negligence in that respect, but the *Margaret*, knowing that the *Clan Sinclair* was steaming up the river, attempted to pass between the latter ship and another vessel named the *Zephyr*, where there was not room, and so brought about the collision. It was held, however, that notwithstanding the negligence of which the *Clan Sinclair* was guilty she was not to blame, that the *Margaret* was alone to blame, because she could, by the exercise of reasonable skill and care, have avoided the collision. Lord Blackburn in giving judgment expressed himself thus: "Then it is said that the collision was owing to the *Clan Sinclair* being where it was. Undoubtedly in one sense that is so. If the *Clan Sinclair* had been some hundred yards higher up the river, the fact which made it a matter of rashness for the *Margaret* to run where it did run would not have existed. But that is not a sufficient ground for saying that the fact of the *Clan Sinclair* being there was the cause of the accident. The *Clan Sinclair* would not have been there at the time when it was there if it had not been that that vessel did not ease and wait so soon perhaps as it ought to have done; but that was not the cause of the accident, but that the *Margaret*, knowing where the *Clan Sinclair* was, attempted to pass between it and the *Zephyr* where there was not sufficient room." Lord Watson delivered judgment to the same effect. The principle of this decision has been many times applied. I shall only refer to one case. It is the case of H.M.S. *Sans Pareil*. (2) It was there held by the Court

(1) 10 M. & W. 546. (2) [1900] P. 267, 283.

of Appeal that as a matter of seamanship it was improper for the tug and tow which collided with the *Sans Pareil* to attempt in the circumstances, as they did attempt, to pass across and ahead of the fleet, of which the *Sans Pareil* formed part, but the appeal was dismissed on the ground that the common law doctrine of contributory negligence as applied in the *Margaret* (*Cayzer & Co.* v. *Carron Co.* (1)) applied here, and that, though the tug and tow had been guilty of negligence in keeping on, yet the defendant was not hampered by the other vessels of the fleet, and might, by the exercise of ordinary care and diligence, have avoided the collision. A. L. Smith L.J. referring to the law of contributory negligence as laid down by Lord Penzance in *Radley* v. *London and North Western Ry. Co.* (2), said it was qualified thus—"namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." He said: "The case of the *Margaret* (1) shews that the common law doctrine is applicable to such a case as that now before us."

Even, therefore, if I assume that the *Bogota* and her tug the *Samson* had transgressed one or more of the Clyde Navigation rules, and were therefore guilty of negligence in getting into the position in the river in which they lay when the collision occurred, I have to ask myself, as Lord Blackburn had to ask himself in the case of the *Margaret*, was this negligence the cause of the collision? In this case the position of the *Bogota* must have been known to those navigating the *Alconda*. The *Bogota* had given the proper whistle to indicate that the river was blocked by her and her tug. The pilot on the *Alconda* heard the signal, knew what it meant and communicated his opinion to the captain, yet with all this knowledge the *Alconda* did not check her speed, but recklessly steamed ahead as if the river in front of her was perfectly clear, relying apparently on the chance that she might have

(1) 9 App. Cas. 873. (2) (1876) 1 App. Cas. 754.

H. L. (Sc.) 1924 — ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO. — Lord Atkinson.

been able to pass through the gap 50 feet wide which separated the tug *Samson* from the southern bank of the river. That was a wrong, a reckless proceeding on her part. In the result her commander had not the skill or courage to effect his purpose. There was apparently nothing to prevent the *Alconda's* slowing down or stopping to give the *Bogota* time to get turned up stream and get out of her way : see finding 21. That might have amounted to the exercise on her part of ordinary care, caution and diligence to avoid the consequences of the *Bogota's* contributory negligence, which I have assumed existed, but the *Alconda* made no effort to do anything of the kind. The cause of the collision was, therefore, in my view, the reckless and dangerous action of the *Alconda* in steaming up stream at the rate and in the way she did in utter disregard of the warning she had received.

I therefore think that she was alone to blame, and the appeal fails and should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, in my view the construction placed upon r. XIX. by Lord Dunedin is sound—namely, that the rule truly and only forbids vessels —even if one assumes them to be engaged in the operation of crossing the river—from getting into the way of upgoing or downgoing craft. Such a construction appears to me, further, to be consistent with the other provisions of the local code and with the fair requirements and combination of dock and river traffic ; and its application will depend upon a fair view of all the facts as these may apply to an emergent vessel.

I cannot see my way to hold that the *Bogota*, which had 265 feet of her length emerging into the river and 150 feet of her length still within the dock gates, the river being both up and down clear up to that point, was contravening the rule. Nor, however, I must add, could I see my way to hold that she was engaged in crossing the river towards the other side. She was in point of fact being manœuvred in order to straighten up. Further, I could not see my way to affirm that such a vessel—being towed out from her stern and not

even free from the attaching ropes, handled from the dock side, and no proportion of her under steam being operated—could be reckoned to be a vessel crossing to the other side of the river under her own steam. So that upon both of these fundamental points I also hold that r. XIX. would not apply to the situation under consideration.

But in truth, in the view which I take of this case, it is really unnecessary to pronounce upon that rule.

For I am of opinion that the action of the *Alconda* was wholly and solely to blame for the collision that occurred, and that for the following reason. The *Bogota* had only partially emerged from dock as above described up to the moment when the river both up and down was clear. At that point, however, the *Alconda* hove into view, and at once the *Bogota* sounded four blasts signifying that she was an obstruction, the tug *Samson* repeating these blasts. These signals were heard by the *Alconda*; they were not mistaken; and it was known to the *Alconda* that de facto an obstruction was in the river. No question of collision came into play prior to that moment; and the problem only began to arise when the *Alconda* came up the river to all intents and purposes regardless of the obstruction altogether.

The Court below most properly held, in my opinion, that the *Alconda* was solely to blame. My opinion is that partial or contributory blame can only be assigned to the *Bogota* if, subsequent to the given and accepted notice of her being an obstruction, the *Bogota* did something to contribute to, or fail to minimize, the collision which was being precipitated by the reckless advance of the *Alconda*. It is not, in the view which I take, sufficient in law to say that the *Bogota* should not have been, on the view that r. XIX. applies, crossing the river, for it is not suggested that she was crossing the river in any sense which was faulty; and, so far as the *Alconda* and the collision are concerned, the *Bogota* from the time that the vessels sighted each other was in the river as an obstruction, known by the *Alconda* to exist, and therefore to be avoided.

The principle does not apply to shipping law alone, but to

H. L. (Sc.) 1924 ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO. Lord Shaw of Dunfermline.

all the law of contributory negligence, from *Davies* v. *Mann* (1) downwards. And I take the principle to be that, although there might be—which for the purpose of this point I am reckoning that there was—fault in being in a position which makes an accident possible yet, if the position is recognized by the other prior to operations which result in an accident occurring, then the author of that accident is the party who, recognizing the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part could have been avoided. Unless that principle be applied it would be always open to a person negligently and recklessly approaching, and failing to avoid a known danger, to plead that the reckless encountering of danger was contributed to by the fact that there was a danger to be encountered. There is a period of time during which the causal function of the act or approach operates and it is not legitimate to extend that cause backwards to an anterior situation. The anterior situation may be brought about either innocently or by some mistake; but if it has nothing to do with the subsequent operations which contributed to produce an accident or collision, it is not legitimate to treat it as a contributory in liability for the result thus produced.

In *Admiralty Commissioners* v. *S.S. Volute* (2) Lord Birkenhead (then Lord Chancellor) in a valuable judgment applies this principle: "In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A. recovers in full." That appears to me completely to fit the situation of the *Bogota*, even on the assumption that she had contravened r. XIX., as I do not think she had. The whole cause of collision arose from a subsequent and severable negligence on the part of the *Alconda*; that is to say, negligence arising subsequent to the known existence of the obstruction, and severably caused

(1) 10 M. & W. 546. (2) [1922] 1 A. C. 129, 136.

by the *Alconda's* approach to and collision with that obstruction.

I therefore think it right to set down again the language of Selborne L.C. on this topic, used also in a case of shipping collision : *Spaight* v. *Tedcastle* (1) : " Great injustice might be done, if, in applying the doctrine of contributory negligence to a case of this sort, the maxim, *Causa proxima, non remota, spectatur*, were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiffs cannot be established merely by shewing that if those in charge of the ship had in some earlier state of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendant's fault, and if it had no proper connection as a cause with the damage which followed as its effect."

In the present case accordingly, my Lords, I think that the question which is truly relevant on the point of partial liability is;—whether the conduct of the *Bogota* and her tug in the river, subsequent to the stage when they were there recognized to be obstructions, did something to precipitate or partially to cause the collision. It is for this reason that I think the House is greatly helped by two findings which establish first, that the *Bogota*, even although she had been crossing the river, did so leaving quite enough of room—namely, 100 feet—within which the *Alconda*, if she was determined to pass her, could have done so with complete safety ; and, secondly, that there was nothing which the *Bogota* or her tug did or could have done to avoid the collision so being swiftly brought about by the *Alconda's* approach. These findings are as follows : " that the collision occurred about 100 feet from the south bank, and that the *Alconda* could

(1) (1881) 6 App. Cas. 217, 219.

H. L. (Sc.) 1924

ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO.

Lord Shaw of Dunfermline.

have manœuvred in safety to within 50 feet of that bank" ; and "that the *Samson*, from the position in which she was, could not do anything to escape the collision and was at the time doing her utmost to keep the *Bogota's* stern to the north against the tide, in conformity with her orders from the *Bogota*."

It therefore appears to me that the judgment of the Court below was completely justified to the effect that the *Alconda* was wholly in fault. Upon the point of procedure—this case having originated in the Sheriff Court and raising the question as to findings in fact or mixed law and fact and our duty in the House in such circumstances—I also fully agree with my noble and learned friend on the Woolsack. I should add to the authorities which he cites the decision of Lord Kinnear in *Black* v. *Fife Coal Co.* (1) in this House.

I think that the appeal should be dismissed with costs.

LORD PHILLIMORE. My Lords, I have read the opinion of the noble Lord, Lord Dunedin, and I concur with his conclusion, and upon the whole with his reason for it. It may be a refinement of thought ; but I should reach the same conclusion by a slightly different way, more nearly resembling the reasoning of the noble and learned Lord, Lord Shaw.

All rules relating to navigation by one ship with reference to another ship (rules to prevent collision) assume the existence and the duty to know of the existence of the second ship as being sufficiently near in time and space to require consideration.

If there is no other ship in that part of the Clyde, a vessel may cross or proceed up or down in any part of the channel, may keep her course or change it, go ahead or astern, festoon herself with lights or proceed with none, scream with her whistles or be entirely silent.

Now, in this case, when the *Bogota* started to leave the dock, there was, according to the findings of the Court below, by which we are bound, no vessel in existence sufficiently close for the *Bogota* to have any duty towards her. Or, one

(1) 1912 S. C. (H. L.) 33.

might qualify this by saying that if there was any such vessel in existence, she had not given such notification of her presence as to make it the duty of the *Bogota* to know of her existence. The *Bogota*, therefore, lawfully came out of dock, although the coming out of dock may have meant, as I should think, that she would be crossing the river and crossing under steam; and she was entitled to go on with her manœuvre till the time came when it was her duty to be conscious of the existence of another vessel. That time, according to the findings (one may be allowed some private doubt whether they are correct, but we are bound by them), did not arrive till the *Bogota* had got into such a position that she was helpless to do anything on her part to avoid a collision; and, therefore, though she may have been "crossing the river under steam," and, therefore, within the apparent compass of r. XIX., she had never come under r. XIX. before the time came when that rule was superseded by r. III., and the duty of avoiding collision was shifted from her to the other vessel.

LORD BLANESBURGH. My Lords, as explained by the noble Lord on the Woolsack, the effect of s. 40 of the Judicature Act has been to withdraw from your Lordships' cognizance many matters which were in controversy between the parties in the Court of Session, and the appellants now face this House with the admission that unless they establish that r. XIX. of the Clyde Regulations was applicable to the *Bogota* when she first sighted the *Alconda*, they can no longer contend with success that the *Bogota* was in any way responsible for the collision that ensued.

In the view which I take of the whole facts found by the Court below, the appellants would be no nearer success in their appeal if they were to establish the proposition on which they stake its fortunes.

Accordingly, I hesitate to follow them in their argument. Their appeal must, I think, fail, whether that argument is well founded or not, and if I do go into the question it is only out of deference to the fulness with which it was canvassed before your Lordships by counsel on both sides.

H. L. (Sc.) 1924

ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO.

Lord Blanesburgh.

Now, although one must be struck with the inaptness of the language of r. XIX. to describe the operation in which the *Bogota* was at the time engaged, I am prepared to assume, as a mere matter of words, that the *Bogota* was then crossing under her own steam towards the other side of the river. My own opinion, however, is that if you consider r. XIX. in its relation to the other regulations of the Clyde Trustees, you find it was not r. XIX. with its attendant responsibilities, but r. XVIII. with its implied attendant privileges, that during that period applied to the *Bogota*.

It must, I think, be agreed, as I have said, that the operation on which the *Bogota* was engaged is not described with any aptness in r. XIX. She was not in real truth crossing towards the other side of the river. She was in fact coming out of dock. For such a vessel as she, it is r. XVIII. that makes provision.

The significance and necessity of such a general regulation as r. XVIII.—to the terms of which I will presently return—is illustrated by the position of the *Bogota* at the moment when the *Alconda* was sighted by her. She had then emerged from the dock, stern first, to the extent of from one-half to two-thirds of her length. She could have held on by her ropes still attached to the quay, or she could proceed with her manœuvre. But one thing she could not do—and this is all important—she could not return to the dock or withdraw from the northern half of the river any part of her hull which had passed into it. In other words, in the course of a common and ordinary evolution she was powerless to keep out of the way of any vessel coming down the river, and so soon as her stern had crossed the middle line of the stream she was powerless to keep out of the way of any vessel coming either up or down until her manœuvre had been completed.

Now r. XVIII. applies to all vessels coming out of any dock on the river. The *Bogota* is 415 feet in length. There must be many vessels using graving docks on the Clyde of equal and even greater length. The river at Elderslie is 500 feet wide. There must be other docks on the Clyde where the river is no wider. This dock enters the river at an angle of 30° to the

west. There must, I should suppose, be other docks where the angle of approach is more direct. In other words, r. XVIII. deals with an operation which time and again cannot be completed without an obstruction quite unavoidable being occasioned to the river traffic, both up and down, and as the emerging vessel can on these occasions only avoid causing obstruction by not emerging at all, the necessary assumption, in the absence of a regulation prohibiting all emergence whatever from a dock unless the river is clear in each direction, must be that the passing traffic is to keep clear of the emerging vessel, and this, as I read it, is the foundation on which r. XVIII. rests. The rule is as follows: "Vessels coming out of dock shall signify the same by a prolonged blast of the steam whistle of not less than five seconds' duration, and, in cases where a vessel is not under steam, the tug boat in attendance shall make the same signal." The rule, it will be seen, is in the most general terms. Unlike r. XIX. it applies indifferently to all vessels—whether sailing vessels or steamships, whether under steam or not under steam. It places no restriction upon a vessel's emergence from a dock, but it requires every such vessel to announce its approaching advent into the river by a prolonged warning blast. Why, it may be asked, is that obligation imposed? The answer surely is in order to give to all passing vessels an opportunity of keeping out of her way, and that, as much if she is a steamship "under steam" as if she is not a steamship at all. But why again should these vessels be required to think of her, if, being a steamship "under steam" she, upon the hypothesis that r. XIX. applies to her, is bound to keep out of their way? The answer, as it seems to me, again must be that r. XIX. has no application to such a case. Even standing alone, the necessary implication of r. XVIII., I think, would be that to every vessel coming out of dock vessels navigating up and down the river and duly warned, shall give place. But that that is its true implication is confirmed by r. CIII. of the Clyde Regulations to which I have referred since the argument at your Lordships' Bar. That rule in its last sentence provides as follows: "No

H. L. (Sc.) 1924

ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO.

Lord Blanesburgh.

vessel when being taken into or out of a graving dock or ship basin or to or off a slip dock shall be allowed unnecessarily to obstruct the navigation or interrupt the passing of other vessels." The right of such a vessel to obstruct or interrupt, so far as is necessary, is, it will be seen, there assumed.

Now if the necessary implication of r. XVIII. be what I have stated, it becomes apparent that a vessel under steam cannot be governed both by r. XVIII. and by r. XIX. at the same moment. The rules are quite inconsistent. Her express obligations under the latter rule would be destructive of and would render nugatory her privileges under the former. If, then, a choice must here be made between rr. XVIII. and XIX. as the rule applicable to the *Bogota*, there can, I think, be no doubt where the choice lies. Rule XVIII. in terms covers her case; r. XIX. only barely touches it.

This conclusion imports that r. XIX., notwithstanding the apparent generality of its terms, is really restricted in its range. A perusal of the Clyde Regulations as a whole shows that this is the fact. A striking illustration may be taken from an observation made by the Sheriff Substitute in the note to his interlocutor. "Rule XIX.," he says, "is of course not limited to ferry boats." The learned Sheriff Substitute, not perhaps unnaturally, assumed that the rule was primarily applicable to them. A perusal of the Regulations, however, shows how far this is from being the case. Steamships on the Clyde have to keep clear of ferry boats at their peril. Reg. CII. provides as follows: "Every master or other person in charge of a steam vessel when approaching any of the ferries on the river, shall, at least 200 yards from the ferry, slow the engines and proceed dead slow until the ferry is passed." It will, I think, be agreed that general as is the language of r. XIX. it has much less relation to the operation in which the *Bogota* was engaged on this afternoon than it has to the crossing of a ferry boat. This last, however, is not apparently intended to be covered by it.

In regard to the position on the river of a vessel coming out of dock there is a passage in the Lord Justice-Clerk's judgment which is not without interest in this connection.

It is where he refers to a statement made in evidence by the pilot of the *Bogota* that in his experience he had never seen a vessel trying to pass another which was in course of coming out of dry dock. This statement of course, even if your Lordships could treat it as a fact found—and that is not open to your Lordships—could not affect the true construction of printed regulations. I refer to it only as describing what I may call the normal courtesy of the river extended to vessels more or less hampered in their movements in the course of an experience which every vessel is from time to time called upon to undergo. If so, this is not the first time that rules of courtesy have been based upon and go only a little beyond the rules of obligation which by the regulations as I construe them are imposed upon these passing vessels. I mention, merely to show that I have not overlooked the fact, that the *Bogota* did not give a prolonged blast of the whistle before leaving the graving dock as prescribed by r. XVIII.; she and her tug each gave three short blasts instead. It is found, however (finding 9), that the failure to give the long blast had no bearing on the subsequent collision. In other words, if r. XVIII., with its necessary implications, is the rule applicable, the *Alconda* derives no advantage from the fact that its provisions were not in this respect observed by the *Bogota*.

In the application, therefore, of r. XVIII. to the case you have a complete answer to the appeal.

But there is, to my mind, still another. There is, I think, in the stated circumstances enough to dispense the *Bogota* from the obligations of r. XIX. if, contrary to my own view, that rule really applied to her.

I have already stated what the position of the *Bogota* was at the moment when the *Alconda* was first sighted by her. It results from that statement, if correct, that she was then in relation to any vessel coming down the river in the language of r. III. "out of command," if by the compelling force of r. XIX. she stood bound by remaining stationary to keep clear of the *Alconda* coming up the river.

Was she so bound? My Lords, I have some difficulty

H. L. (Sc.) 1924

ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO.

Lord Blanesburgh.

in seeing how to a vessel so placed r. XIX. continued to apply. Like all similar rules the rule must be reasonably construed. Its proper sphere, as I hope I have shown, is a narrow one. But of it this can, I think, at least be said, that the rule implies that the crossing steamer, which is by its terms obliged to keep out of the way of all vessels whether navigating up or down the river, shall not be entitled to require any of these vessels to keep out of her way, shall not be entitled, in other words, to hold them up. For note the consequences if the rule applies to a vessel so entitled. However crowded the traffic in her own half of the stream, however insignificant the traffic in the other half, it would remain her duty indefinitely to block the first flow of traffic, in order that, under the rule, the second trickle might have free course and passage. The rule does not, in words, cover such a state of things. On the contrary, it imposes upon the crossing vessel obligations which negative its existence, and if, for instance, the approach to the Elderslie Dock on this afternoon of the Spanish steamer the *Artivi Mendi*—coming down the stream had, instead of preceding, synchronized with the approach of the *Alconda* coming up, I cannot myself doubt that it would, under r. III., have been the duty of the *Artivi Mendi* to keep clear of the *Bogota*—which thereupon became dispensed from any obligation under r. XIX. of keeping clear either of her or of the *Alconda*. In the present case, however, there was no vessel actually coming down the stream at the time. The *Bogota* delayed coming out of dock until the river was clear in both directions, and by the time she was committed to her manœuvre it was a vessel coming up the river and not one coming down that first presented itself. Does this fact alter the whole case? For myself, I think it should not. I take the effect of r. XIX. to be that where a manœuvre, such as the *Bogota's*, has in propriety been commenced, and where it has so far proceeded as to make withdrawal to the status quo ante out of the question the possibility even of approaching traffic on her own side of the river from which she is neither able nor bound to keep clear except by completing

her manœuvre is sufficient, on due warning under r. III. being given, to exclude her from the obligations of r. XIX. in relation to all vessels whether coming up or down. I cannot doubt that it was on this view of her position that the *Bogota* acted when she sounded her four blasts and proceeded with her manœuvre, and I am not surprised that those on board the *Alconda* apparently without hesitation conceded that position to her.

I am of opinion, therefore, that, for one reason or another, r. XIX. is out of the case.

But, my Lords, I fully recognize that in this matter there is room for difference of opinion. I will accordingly now assume, contrary to my own view, that the *Bogota* on this occasion was bound by r. XIX., and that in view of the *Alconda's* approach she was in fault under that rule in advancing over the middle line of the river. Even so, as I have already indicated, I am of opinion that the *Alconda* was, on the facts stated by the Inner House, alone to blame for the subsequent collision between herself and the *Samson*. These facts have already been set forth. I need not repeat them.

There is no dubiety as to their effect. They show on the part of the *Alconda* a complete appreciation of the position of the *Samson*, and her tow; an acquiescence in their claim, after signal given, to block the river, and a decision notwithstanding to go on at the same speed, instead of stopping, as was quite feasible.

And all this was done in the belief that the *Alconda* could pass to the south of the two vessels in safety. The collision was the direct result either of the failure on the part of the *Alconda* to stop and hold back as she could and ought to have done, if there was no room to pass, or it was due to her negligent navigation in not taking advantage of the passage sufficiently wide to enable her to pass in safety. Her liability, this passage being sufficiently wide, differs in degree and not in kind from what it would have been had the stern of the *Samson* been to the north of the middle line of the river and had the *Alconda* negligently starboarded into her.

H. L. (Sc.) 1924

ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. PACIFIC STEAM NAVIGATION CO.

Lord Blanesburgh.

The Volute, in your Lordships' House (1), is now the locus classicus on this subject. It has made no alteration in the law, as previously understood, in relation to facts like these. My noble and learned friend Lord Shaw has referred to the passage from the Lord Chancellor's speech in which he reaffirms the law.

Applying that language I cannot, my Lords, doubt on the facts stated that even if the *Bogota* were originally at fault, "there would here have been no damage had not the *Alconda* been, as she was, subsequently and severably negligent." She is therefore liable for the whole damage.

I have only to add that had I felt constrained to hold that the *Bogota* was partly to blame for this collision, I should, in restoring the order of the learned Sheriff Substitute, have desired to modify it as suggested in the opinion of Lord Ormidale, with whom alone in the Second Division the contentions of the *Alconda* found favour. On any view of the case the fault of the *Bogota*, as contrasted with that of the *Alconda*, was venial and slight. From first to last, the proceedings of the *Alconda*, whether they be regarded subjectively or objectively, were without justification or excuse; the blame attaching to her greatly preponderated, and I should have agreed with Lord Ormidale in thinking that she should bear three-fourths of the resulting damage.

On the whole, however, my Lords, I am of opinion that she was alone to blame and that this appeal should be dismissed.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, Feb. 11, 1924.

Agents for the appellants: *William A. Crump & Son, for Maclay, Murray & Spens, Writers, Glasgow, and J. & J. Ross, W.S., Edinburgh.*

Agents for the respondents: *Godfrey, Warr & Co., for Batesons & Co., Liverpool, and Wright, Johnston & Mackenzie, Writers, Glasgow, and Webster, Will & Co., W.S., Edinburgh.*

(1) [1922] 1 A. C. 129.

[HOUSE OF LORDS.]

H. L. (E.)*
1924
Feb. 25.

P. SAMUEL AND COMPANY, LIMITED . APPELLANTS ;

AND

DUMAS . . . . . RESPONDENT.

Insurance (Marine)—Scuttling of Ship with Connivance of Owner—Claim by innocent Mortgagee—Insurable Interest—Mortgagee's Interest, whether Original or Derivative—Perils of the Sea—Condition against Over-insurance —Breach—Waiver of Breach—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 3, *sub-s.* 2; *s.* 5, *sub-s.* 2; *s.* 34, *sub-s.* 3; *s.* 50, *sub-s.* 2; *s.* 55, *sub-ss.* 1 *and* 2; *Sch.* I., *rr.* 7, 12.

A Greek subject purchased a ship, which was thereupon removed from the British register and received a provisional certificate of Greek nationality, and for the purpose of the purchase he obtained an advance from his banker to be secured by a mortgage on the ship. The mortgage consisted of two documents: first, a mortgage of the ship in British statutory form to secure the whole of the owner's current account; secondly, a deed of covenant and mortgage agreement, which recited an agreement by the owner to deliver to the mortgagee a formal first mortgage of the ship duly executed and registered in Greece. By this deed the owner assigned the ship and all policies effected or to be effected thereon as security for the sum advanced and all moneys due or to become due from him, and covenanted to effect the complete registration of the ship as a Greek ship and to insure the ship and her freight as the mortgagee should approve. No mortgage of the ship was ever registered in Greece. In pursuance of the covenant to insure, a time policy on the ship was taken out by the plaintiffs, shipbrokers, "and/or as agents, as well as in their own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all" against perils of the sea and other specified contingencies including barratry of the master and marines, "and of all other perils, losses, and misfortunes that . . . shall come to the hurt, detriment, or damage of the said . . . . ship, etc., or any part thereof." The policy contained the usual f.c. and s. clause and it also contained a warranty that "the amount insured for account of assured" on (inter alia) freight (p.p.i.) should not exceed a certain limit. A separate insurance was effected by the plaintiffs against loss of freight by war risks only in a sum exceeding the amount allowed by the warranty. The defendant underwrote both policies. During the currency of the marine policy the ship was scuttled by the master and crew, or some of them, with the connivance of the owner, but without any connivance or complicity on the part of the mortgagee.

* *Present:* VISCOUNT HALDANE L.C., VISCOUNT CAVE, VISCOUNT FINLAY, LORD SUMNER, and LORD PARMOOR.

H. L. (E.)
1924
P. SAMUEL & CO. v. DUMAS.

In an action on the policy by the plaintiffs on behalf of the mortgagee:—

Held, (1.) that the mortgagee had an insurable interest in the ship;

(2.) on the facts, that there was evidence upon which the trial judge could find that the interest of the mortgagee in the policy was not by way of assignment from the owner, but was original, and that, consequently, the mortgagee was not affected by the fraud of the owner;

(3.) that the over-insurance of the freight against war risks was a breach of the warranty in the marine policy; but

(4.) (by Viscount Cave and Lord Parmoor; Viscount Finlay and Lord Sumner dissenting) that the defendant, by being a party to the issue of the policy on the freight against war risks, was precluded by waiver or acquiescence from treating the marine policy as void for breach of the warranty;

(5.) (by Viscount Cave, Viscount Finlay, and Lord Parmoor; Lord Sumner dissenting) that the loss of the ship by scuttling was not a loss by a peril of the sea and was not included in the general words of the policy; it was accordingly not covered by the policy.

Held, therefore (Viscount Haldane L.C. giving no reasons for his conclusion), that the action failed.

Opinion of the Court of Appeal in *Small* v. *United Kingdom Marine Mutual Insurance Association* [1897] 2 Q. B. 311 overruled.

Decision of the Court of Appeal [1923] 1 K. B. 592 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Bailhache J. in an action on a policy of marine insurance on the steamship *Grigorios*.

The action was brought by a firm of shipbrokers, the assured, on behalf of the owner and the mortgagee of the ship. Bailhache J. found that the ship had been scuttled by the master and crew with the connivance of the owner and there was no appeal from that decision, but he held that the mortgagee was entitled to recover on the policy to the extent of his debt. This decision was reversed by the Court of Appeal (Bankes and Scrutton L.JJ. and Eve J.) on the ground that a condition in the policy against over-insurance had been broken, and by Scrutton L.J. (Bankes L.J. and Eve J. dissenting) on the further ground that the loss was not caused by any of the perils insured against.

The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the opinion of Viscount Cave.

(1) [1923] 1 K. B. 592.

1923. Nov. 2, 5, 6, 8; Dec. 10, 11. *Sir John Simon K.C.* and *A. T. Miller K.C.* (with them *Lowry Porter*) for the appellants. As to the warranty clause, it is contained in a policy against marine risks as opposed to war risks. Upon the natural construction of the clause its ambit is the ambit of the perils insured against, and when the clause speaks of "the amount insured" it does not impose restrictions on policies including different risks. All the clauses of the policy are to be read secundum subjectam materiam. Bailhache J., who states his reasons more fully in *Anghelatos* v. *Northern Assurance Co.* (1) was right in confining the effect of the clause to marine risks. Further, on the facts, the insurance on freight was not effected on behalf of the mortgagee. Assuming that there is a breach of the warranty, the true result is not that the contract is void, but that it is voidable at the option of the underwriter, and if the underwriter acts in a way that is in conflict with the avoidance of the contract he cannot be heard to say that the contract is unenforceable. By being a party to the issue of both policies he has precluded himself from relying on the breach. Either he has waived the breach by his conduct or he has elected not to set up the breach as avoiding the contract: see Marine Insurance Act, 1906, s. 34, sub-s. 3.

R. A. Wright K.C. and *W. L. McNair* for the respondent. There is no ground for qualifying or restricting the words of the warranty clause. It is limited to honour policies for account of the assured, but the Court of Appeal were quite right in refusing to place any further limitation on the clause than such as is to be found in the language used. This clause deals with matters outside the contract altogether, and it is not right to compare it with other clauses of the policy of a different character and having a different purpose —clauses which are necessarily confined to the risks insured against. The object of this clause is to guard against all kinds of over-insurance of a gambling character affecting the subject matter of the insurance, and so to remove the temptation to scuttle the ship. An underwriter is just as

(1) (1923) 14 Ll. L. Rep. 361, 374.

H. L. (E.) 1924 P. SAMUEL & Co. v. DUMAS.

likely to be affected by over-insurance, whether the risk insured against is a marine or a war risk, and he has the right to stipulate in general terms against any over-insurance by the assured on the subject matter of the insurance. There is therefore no reason for cutting down the clause: see *Thames and Mersey Marine Insurance Co.* v. *Gunford Ship Co.* (1), per Lord Shaw of Dunfermline. The respondent by underwriting both policies cannot be held to have waived his right to enforce the condition in the marine policy. There can be no waiver without knowledge and intention, and when he underwrote the war policy there is no evidence that his mind was directed to the point: *Clarke and Chapman* v. *Hart* (2); *Bentsen* v. *Taylor, Sons & Co.* (3) The drawing up of the policy is mere machinery and follows automatically on the signing of the slip; it therefore cannot be any evidence of an intention to waive on the part of the respondent: Arnould on Marine Insurance, 10th ed., vol. i., § 102. As to the mortgagee's interest in the policy, on the true view of the facts, this was an insurance by the owner and the mortgagee's interest was by way of assignment only; it was a derivative and not a separate and independent interest. The mortgagee was therefore affected by the fraud of the owner. But, assume that the policy was taken out on behalf of the owner and the mortgagee, it is still one contract, and no one of the parties to a joint insurance is in a better position than another. In a joint policy their interests are so inseparably connected that the misconduct of one of the assured enures for all. It is an implied condition of the policy that the ship shall not be scuttled by the assured, and if a joint assured destroys the ship that is not a loss for which the insurer is liable. If the mortgagee succeeds the mortgagor will profit by his own wrong, for his debt will be reduced: Phillips on Insurance, 5th ed., vol. i., §§ 232, 235, 398; Duer on Insurance, vol. i., Lecture III., § 15, p. 325. The insurer is not liable for any loss attributable to the wilful misconduct of the assured: Marine Insurance Act, 1906, s. 55,

(1) [1911] A. C. 529, 544. (2) (1858) 6 H. L. C. 633, 665–6.
(3) [1893] 2 Q. B. 274, 283.

sub-s. 2 (*a*). On any view of the case this is not a fortuitous accident of the sea: *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (1), per Collins L.J. It is conceded that perils of the sea may be brought into operation by some improper action of the owner: *Thompson* v. *Hopper* (2); but where a ship is deliberately scuttled there is no question of perils of the sea. The loss is not due to any action of the wind or waves, but is due to the sinking of the ship by ordinary gravitation. Where a hull was so rotten that water kept coming in and the hull so far sank that the cargo was damaged, there being no weather or other fortuitous circumstance contributing to the incursion of the water, it was held by the Privy Council that the loss was not due to a peril of the sea: *Sassoon & Co.* v. *Western Assurance Co.* (3), which was followed in *Grant, Smith & Co.* v. *Seattle Construction and Dry Dock Co.* (4) "Perils of the sea" refers only to fortuitous accidents of the sea, and does not include ordinary action of winds or waves. A loss caused by the incursion of sea-water is not a loss by perils of the sea where the incursion is due simply to the defective condition of the vessel: *Mountain* v. *Whittle* (5); and see *Dudgeon* v. *Pembroke.* (6) There is no difference between a ship inherently unfit to keep out water and a ship deliberately so made by the owners. In each case the ship sinks because she is unable to float, and a marine policy is not a guarantee that a ship will float. No doubt an underwriter takes the risk of loss from unascertainable causes: *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* (7); but here all the facts are known. Even assuming that any question of perils of the sea arises, the dominant cause of the loss, the causa proxima, which alone is to be looked at, is the scuttling of the ship and not the incursion of the sea water consequent thereon, and therefore the loss is outside the perils insured against: *Leyland Shipping Co.* v. *Norwich*

(1) [1898] 2 Q. B. 114, 127.
(2) (1856) 6 E. & B. 172, 937; (1858) E. B. & E. 1038.
(3) [1912] A. C. 561, 563.
(4) [1920] A. C. 162, 171.
(5) [1921] 1 A. C. 615, 619, 626.
(6) (1874) L. R. 9 Q. B. 581, 597.
(7) [1901] A. C. 362, 371.

H. L. (E.) 1924 P. SAMUEL & CO. v. DUMAS.

Union Fire Insurance Society. (1) *Fenton* v. *Thorley & Co.* (2) and *Trim Joint District School Board of Management* (3) are decisions as to the meaning of the word "accident" in the Workmen's Compensation Acts and have no bearing. *Small* v. *United Kingdom Marine Mutual Insurance Association* (4) can only be justified as a decision on barratry, which was the sole point decided. There is no suggestion of perils of the sea throughout the case, and Lord Esher's dictum that "if a stranger had done something wrong to the ship by reason of which the sea had got into the ship, and she had been sent to the bottom, then by insurance law that would be a loss by perils of the sea," (*a*) was given on a point which was not argued and is wrong; (*b*) is distinguishable on the ground that here the scuttling was not the act of a stranger. Nor can that dictum be treated as having acquired an unassailable position by lapse of time, because scuttling is a very rare occurrence. Here no question of barratry was raised before Bailhache J., nor could it be successfully raised, for, as Scrutton L.J. says, the scuttling was the act of the sole owner, and any share of the master in it was not barratrous, for it was not a fraud against the owner, but with his privity. A master who is sole owner cannot commit barratry, because he cannot commit a fraud against himself: *Jones* v. *Nicholson* (5), per Pollock C.B. And see the definitions of barratry collected in Chalmers' Marine Insurance Act, 3rd ed., p. 194. [They also referred to *British and Foreign Marine Insurance Co.* v. *Gaunt.* (6)] Nor does the loss fall within the general words "and of all other perils, &c.," which must be construed on the ejusdem generis principle. Lastly, the mortgagee has no insurable interest within the meaning of s. 14 of the Marine Insurance Act, 1906. A mortgage on a Greek ship, to be valid, must be registered in Greece before loss or before the bankruptcy of the owner and must be for a specified sum. The mere promise by the

(1) [1918] A. C. 350.
(2) [1903] A. C. 443.
(3) [1914] A. C. 667.
(4) [1897] 2 Q. B. 42, 311.
(5) (1854) 10 Ex. 28, 37.
(6) [1921] 2 A. C. 41, 63.

owner to register creates no equitable interest: *Stainbank* v. *Fenning*. (1) In any case the security must be limited to the specific amount advanced and does not cover other moneys due on current account. [They also referred on this point to *Castellain* v. *Preston* (2) and *Ebsworth* v. *Alliance Marine Insurance Co.* (3)]

Sir John Simon K.C. in reply. As to the nature of the loss: if this vessel had been sent to the bottom by a passenger or a stowaway that would not have had any effect on the contract of insurance. In *Thompson* v. *Hopper* (4) Lord Campbell, after stating that the assured cannot recover for a loss produced by his own wrongful act, continues: "The plaintiffs' counsel said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled or sunk by being wilfully run upon a rock." The loss is still due to a peril insured against, but no assured can recover for an accident caused by his own wilful misconduct. This is so both at common law: *Heyman* v. *Parish* (5); *Dudgeon* v. *Pembroke* (6), and by the express terms of the Insurance Act, 1906, s. 55, sub-s. 2. *Small's Case* (7) has stood for twenty-six years, and there is no good ground for reversing the opinion of the Court of Appeal. A. L. Smith L.J., as well as Lord Esher, there treats scuttling as a loss by perils of the sea and Rigby L.J. concurs in the judgment. Then is there here so close a relation between the mortgagor and the mortgagee that the fault of the mortgagor hits the mortgagee? In *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (8) Mellish L.J., in discussing the nature of the interests of mortgagor and mortgagee in a marine policy, shows that those interests are separate and distinct. It follows that the circumstance that the mortgagee has insured not only his own interest but the interest of the mortgagor

(1) (1851) 11 C. B. 51.
(2) (1883) 11 Q. B. D. 380, 398.
(3) (1873) L. R. 8 C. P. 596, 608, 641.
(4) 6 E. & B. 172, 191–2.
(5) (1809) 2 Camp. 149.
(6) (1877) 2 App. Cas. 284.
(7) [1897] 2 Q. B. 311.
(8) (1877) 5 Ch. D. 569, 583.

H. L. (E.) 1924 P. Samuel & Co. v. Dumas.

does not prevent him from recovering to the extent of his own interest because the mortgagor cannot profit by his own wrong. The mortgagor's interest is not the interest which the underwriters must pay up. Bailhache J. has found, and the Court of Appeal have agreed with him, that the interest of the mortgagee in the policy in this case is not by way of assignment, but is an original and independent interest. The mortgagee had also an equitable interest in the ship, and he has an insurable interest within s. 5, sub-s. 2, of the Marine Insurance Act, 1906: *The Byzantion* (1); *Moran, Galloway & Co.* v. *Uzielli* (2); *Wilson* v. *Jones* (3); *Paterson* v. *Harris.* (4)

The House took time for consideration.

1924. Feb. 25. Viscount Cave. My Lords, the steamship *Grigorios* (formerly the *Grindon Hall*) was purchased by one Denis Anghelatos, a Greek subject, on September 13, 1920, and on the same day she was removed from the British register and received a provisional certificate of Greek nationality, which enabled her to fly the Greek flag pending registration in Greece. On the same day Anghelatos, who was already indebted to his bankers, Messrs. Samuel & Co., in a considerable sum, borrowed from them a further sum of 22,500*l.* to enable him to pay off a charge on the *Grigorios* on the terms that he should give them a mortgage on the ship to secure the whole of his current account. Accordingly on September 13, 1920, Anghelatos executed in favour of Samuel & Co. two documents—namely, first a mortgage of the ship in British statutory form to secure his account current, and secondly a deed whereby he assigned the ship as security for the 22,500*l.* and all other moneys due or to become due from him and covenanted (among other things) to effect the complete registration of the ship as a Greek steamship and to insure her and her freight against all perils as the mortgagees should approve. While the advance and

(1) (1922) 38 Times L. R. 744.
(2) [1905] 2 K. B. 555.
(3) (1867) L. R. 2 Ex. 139.
(4) (1861) 1 B. & S. 336, 354-5.

mortgage were being negotiated Mr. Percy Samuel, who carried on business as Samuel & Co., told Anghelatos that he would have to insure the steamship against all risks through the appellants, P. Samuel & Co., Ld. (brokers who looked after insurances for the banking firm), for not less than 100,000*l.*, and in the presence of Anghelatos instructed Mr. Wheler, the manager of the appellant company, to see that this insurance was effected. Anghelatos also desired Mr. Wheler to get the freight insured against all risks for 27,500*l.* The appellants accordingly opened three slips and procured them to be underwritten by the respondent Dumas and other underwriters—namely, (1.) a slip for insuring the hull and machinery of the *Grigorios* against marine risks in a sum of 110,000*l.* for a period of twelve months; (2.) a slip for insuring the freight of the same vessel against marine risks in a sum of 27,500*l.* for the same period; and (3.) a slip for insuring the hull and machinery in 110,000*l.*, the freight (f.i.a.) in 27,500*l.* and the disbursements (f.i.a.) in 16,500*l.*, all against war risks, for a period of six months only. In the month of October, 1920, policies of insurance in accordance with the above slips were duly issued and delivered to the mortgagee.

On February 26, 1921, the *Grigorios*, while on a voyage from Philippeville to the Tyne, foundered in calm weather off the coast of Spain and became a total loss.

On May 20, 1921, the appellants commenced this action against the respondent Dumas on his policies of insurance on the vessel, alleging that the vessel had been lost either by war perils or by ordinary marine perils. Similar actions were commenced against the other underwriters responsible, on their policies. The respondent, among other defences, which will be referred to later, pleaded that the loss was due to the wilful misconduct and fraud of Anghelatos and his agents in procuring or conniving at the sinking of the ship; and at the hearing of the action the trial judge (Bailhache J.) found this plea to be proved. He accordingly dismissed the claim on the war risk insurance, but, holding that his finding of fraud against the owner did not prevent the brokers

H. L. (E.) 1924

P. SAMUEL & CO. v. DUMAS.

Viscount Cave.

from recovering on behalf of the mortgagee under the marine risk insurance, and overruling the other defences raised by the respondent, he gave judgment against the respondent on the marine risk policy for his proportion of the loss.

On appeal to the Court of Appeal that Court reversed the decision of the trial judge and dismissed the action. The judgment of the Court of Appeal was founded principally on the ground that there had been a breach of No. 22 of the Institute Time Clauses, which were incorporated in the marine policy. The material parts of that clause were as follows: "Warranted that (except as hereinafter mentioned) the amount insured for account of assured and/or their managers on premiums, freight, hire, profit, disbursements, commissions, or other interests (policy proof of interest or full interest admitted), *or on excess or increased value of hull or machinery however described*, shall not exceed 15 per cent. of the values of the hull and machinery as stated herein, but this warranty shall not restrict the assured's right to cover . . . . (2.) Freight and/or chartered freight and/or anticipated freight on board or not on board, insured for 12 months or other time.—Any amount not exceeding 25 per cent. of the value of hull and machinery as stated herein, but if the insurance be for less than 12 months the 25 per cent. to be proportionately reduced."

The value of the hull and machinery as stated in the policy was 110,000*l.*, and accordingly the maximum amount which the assured was entitled under the warranty to cover by p.p.i. or f.i.a. policies on freight, etc., was, for a twelve months' insurance, 25 per cent. of the stated value, or 27,500*l.*, and for a six months' insurance one-half of that sum, or 13,750*l.*; and as the freight had in fact been insured with the knowledge of the mortgagee for the full 27,500*l.* for six months only, the Court held the warranty to have been broken, and dismissed the action on that ground. A plea that the breach of warranty had been waived by the respondent was disallowed. In addition to the above ground Scrutton L.J. expressed the opinion that, the ship having been intentionally scuttled with the connivance of the owner, the loss did not

fall within the policy either as a loss by perils of the sea or under the general words; but the other members of the Court held themselves precluded by the decision of the Court of Appeal in *Small* v. *United Kingdom, &c., Insurance Association* (1) from deciding the case on that ground. Thereupon the present appeal was brought.

My Lords, it is convenient to deal first with the point upon which all the judges of the Court of Appeal decided the case against the appellants, as if their decision on that point is right the remainder of the questions argued do not arise.

Upon the question whether there was, in fact, a breach of the warranty contained in cl. 22 of the Institute Time Clauses, I agree with the unanimous judgment of the Court of Appeal. That clause contained a warranty or condition that the amount insured on freight, etc. (p.p.i. or f.i.a.), should not exceed (in the event which happened) 12½ per cent. of the stated value of the hull and machinery, or 13,750*l.*, and, as the f.i.a. insurance of the freight against war risks was for 27,500*l.* there was a clear breach of the warranty unless the word "insured" in the warranty is to be confined to insurances against the perils insured against by the policy in question—that is to say, to insurances against marine perils only to the exclusion of war perils. I see no sufficient ground for so restricting the meaning of the word. The word "insured" in a policy of marine insurance prima facie covers all insurances against sea risks, including war risks; and there is in the policy in question in this case no context sufficient to cut down the natural meaning of the word. It is true that the insurer of a ship against ordinary marine risks is not directly interested in the amount of the insurance of the freight against war risks. But it is said that an over-insurance of freights by honour policies against war risks may tempt the owner to throw away his ship with a view to claiming under the war risk policies and alternatively under the ordinary marine policies, and so may involve the marine underwriters in litigation and loss; and certainly the course

(1) [1897] 2 Q. B. 311.

H. L. (E.) 1924 P. SAMUEL & CO. v. DUMAS. Viscount Cave.

of events in the present case supports that view. Upon the whole I think that the word "insured" must be construed in its natural and ordinary sense, and as including all kinds of marine insurance; and on this point I desire to adopt the reasoning of Scrutton L.J. (1), who said: "It is argued by the mortgagees, and found by the judge, that as this is an insurance against war perils, it does not affect a policy on marine perils, because, as the judge says, the marine underwriter would not have to pay a loss by war perils. This involves reading into the policy the words 'against marine perils' in the first line of clause 22 after the words 'amount insured.' I see no reason for inserting these words, and every reason for not inserting them. Warranties are construed strictly. The reason for this warranty is that the insured should not, by heavy insurances p.p.i., have an opportunity of over-valuing his ship, and a temptation to lose her. This temptation is just as great if the over-valuation and over-insurance are on war risk policies, as if they are on marine policies. Indeed, so long as war risks, producing loss by sinking, may be argued to be losses by perils of the sea, by the incursion of sea water, war risk policies may be very important to the marine underwriter. In the present case the attempt was first made to recover on a fictitious explosion as a war risk, and then changed to a claim in respect of a marine peril."

But, while I am satisfied that there was a breach of the warranty, I think that the respondent Dumas is prevented from taking advantage of it by the circumstance that he was himself a party to the excessive insurance on freight which constituted the breach. Sect. 34 of the Marine Insurance Act, 1906, provides that "a breach of warranty may be waived by the insurer." Now a right may be waived either by express words or by conduct inconsistent with the continuance of the right; and even where there is no actual waiver, the person having the right may so conduct himself that it becomes inequitable for him to enforce it. Here the respondent, who must be assumed to have been aware

(1) [1923] 1 K. B. 624.

that the assured was prevented by the terms of the policy of insurance on the vessel from taking out honour policies on the freight for six months for any sum in excess of 13,750*l.*, joined in the issue of such policies for double that amount and took his share of the premiums on those policies; and I can conceive no conduct more inconsistent with an intention on his part to enforce the restriction. It is argued that at the moment when the representative of the respondent initialled the war-risk slip the amount underwritten if apportioned between the ship, freight and disbursements was not in excess of the amount allowed; but the answer is that the slip then already contained the words, "Hull and machinery, 110,000*l.*; freight, f.i.a., 27,500*l.*; disbursements, f.i.a., 10,500*l.*," and specified the period as six months, so that it was obvious on the face of the document that the underwriters were taking a share in an insurance of that character and amount and expected and intended it to be carried through. Further, when the policy was issued in October, it was known that the full amount specified in the slip had been underwritten; and Mr. Dumas, through his representatives, who must be taken (in the absence of any evidence to the contrary) to have acted with his authority, was a party to the issue of the policy. In my opinion, the respondent and the other underwriters who took that course are prevented by waiver or acquiescence from treating the marine policy on the vessel as void for breach of the warranty.

My Lords, in view of my opinion on the above point, it becomes necessary to deal with the other points argued on behalf of the respondent, and I propose to deal with them in the order in which they arise.

First, it is said that, as the *Grigorios* was a Greek ship at the time of her loss and neither the ship nor the mortgage upon her had then been registered in Greece, the mortgagee had no valid security upon the ship and so had no insurable interest. Upon this point I accept the finding of the learned trial judge that before you can have a valid mortgage on a Greek ship under Greek law the ship and the mortgage must

H. L. (E.) 1924 P. SAMUEL & Co. v. DUMAS. Viscount Cave.

be registered in Greece, and the mortgage must be for a specific sum and not merely for the balance of a current account, and that these conditions were not complied with; but nevertheless I agree with his view that the mortgagee in this case had an insurable interest. Sect. 5 of the Marine Insurance Act, 1906, provides as follows: "(1.) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure. (2.) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof." In the present case the appellant held a British mortgage on the ship and a deed of covenant, which recited an agreement by the owner to deliver to the mortgagee a "formal first mortgage of the said steamship duly executed and registered in Greece," and contained a covenant by him to "take such steps as might be necessary to effect the complete registration of the said steamship as a Greek steamship"; and he was entitled in equity to enforce these agreements. This being so, I think it impossible to say that he was not interested in the adventure within the meaning of the above section; and if so, he clearly had an insurable interest to the extent of the sum secured by the mortgage. This decision is in accordance with such authorities as *Boehm* v. *Bell* (1) and *Wilson* v. *Jones*. (2)

Secondly, it is said that the mortgagee was not originally insured by the policy sued upon, but was a mere assignee of the policy from the owner, and accordingly that as the owner, having scuttled his ship, could not sue upon the policy, this defence is available under s. 50, sub-s. 2, of the Act against the mortgagee. In my opinion, the evidence shows clearly that Mr. Samuel, the mortgagee, was an original party to the insurance, which was effected on his personal instructions, and that the brokers, when they took out the

(1) (1799) 8 T. R. 154. (2) L. R. 2 Ex. 139.

policy "as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain in part or in all," intended to and did enter into the contract of insurance on behalf of the mortgagee as well as on behalf of the owner. This was sworn to by three witnesses, who were neither cross-examined nor contradicted on this point; and I think that the learned judge was fully entitled to find (as he did) that the policy was to be taken out on behalf of the mortgagee to secure the joint interest of himself and the mortgagor, and that there was no question of an assignment. If so, that disposes of this point.

But thirdly, it is argued that, assuming that the insurance was for the joint benefit of the mortgagee and the owner, still it was avoided by the misconduct of the owner. Sect. 55, sub-s. 2, of the Act provides that "the insurer is not liable for any loss attributable to the wilful misconduct of the assured"; and it is argued that, where two persons interested in the same property or adventure are jointly insured by one policy, the misconduct of either is sufficient to avoid it. In support of this contention, a well-known American authority (Duer on Marine Insurance, Lecture III., s. 15) was cited; and it was pointed out that the proposition contended for is not inconsistent with the English case of *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (1), which was a case of negligent navigation and not of wilful misconduct. My Lords, there is force in this argument, but I am not prepared to say that in the present case it should prevail. It may well be that, when two persons are jointly insured and their interests are inseparably connected so that a loss or gain necessarily affects them both, the misconduct of one is sufficient to contaminate the whole insurance: Phillips on Marine Insurance, vol. i., § 235. But in this case there is no difficulty in separating the interest of the mortgagee from that of the owner; and if the mortgagee should recover on the policy, the owner will not be advantaged, as the insurers will be subrogated as against him to the rights

(1) [1898] 2 Q. B. 114.

H. L. (E.) 1924 P. SAMUEL & CO. v. DUMAS. Viscount Cave.

of the mortgagee. In such a case the "assured" referred to in s. 55, sub-s. 2, is the particular assured to whom it is sought to make the insurer liable. In my opinion, therefore, this contention also fails.

But lastly, it is said on behalf of the respondent that, the ship having been wilfully scuttled by the direction of the owner, the loss is not covered by the policy sued upon. In that policy the perils insured against are defined (in the ordinary terms) as perils "of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, etc., or any part thereof." In considering whether the loss of the ship falls within these words, it is necessary first to determine what was the proximate cause of the loss, for it is provided by s. 55 of the Act (which reflects the law as previously established) that unless the policy otherwise provides, the insurer is liable only for losses proximately caused by a peril insured against. Now it was found as a fact by the learned trial judge that the *Grigorios* was thrown away by the master and engineers and some of the crew with the connivance of the owner: and he was apparently satisfied that this was done by deliberately letting water into the ship and into the bilge connections and afterwards causing a sham explosion which induced the innocent members of the crew to leave the ship with those who were guilty and to refrain from using the pumps. The vessel in fact sank very slowly and did not disappear until thirteen hours after the explosion. In these circumstances the question is whether the proximate cause of her sinking was the act of letting the water into the vessel, or the actual inrush of the water. Apart from authority, I should feel no doubt that the former is the true view. There appears to me to be something absurd in saying that, when a ship is scuttled by her crew, her loss is not

caused by the act of scuttling, but by the incursion of water which results from it. No doubt both are part of the chain of events which result in the loss of the ship, but the scuttling is the real and operative cause—the nearest antecedent which can be called a cause; and the subsequent events—the entry of the sea water, the slow filling of the hold and bilges, the failure of the pumps and the break-up of the vessel—are as much parts of the effect as is the final disappearance of the ship below the waves. And if one turns to the cases, then, notwithstanding a dictum of Lord Campbell on the argument of the demurrer in *Thompson* v. *Hopper* (1) and the decision on the appeal in *Small's Case* (2), to which I will refer later, I think that the balance of authority is in favour of the same view. In *Reischer* v. *Borwick* (3), where a ship damaged by collision with a snag in the river was temporarily repaired, but on the leak again opening foundered and was lost, it was held that the collision was the proximate cause of the loss; and that case was approved and followed by this House in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (4), where, a ship having been torpedoed and having sunk two days afterwards in consequence of the damage caused, it was held that the torpedoing was the proximate cause of the loss. There are many other authorities to the same effect, but these two cases are sufficient to illustrate the point; and it is hardly necessary to have recourse to the maxim "Dolus circuitu non purgatur": *Thompson* v. *Hopper* (5), which perhaps applies only as against persons who are parties to the dolus. On the whole I think that the scuttling of the *Grigorios* was the proximate cause of her loss.

Then, was the loss a loss by perils of the seas? Surely not. The term "perils of the seas" is defined in the First Schedule to the Act as referring only to "fortuitous accidents or casualties of the seas." The word "accident" may be ambiguous, and has even been held in another connection to include a

(1) 6 E. & B. 172, 192.
(2) [1897] 2 Q. B. 311.
(3) [1894] 2 Q. B. 548.
(4) [1918] A. C. 350.
(5) 6 E. & B. 937; E. B. & E. 1038, 1045.

H. L. (E.) 1924 P. SAMUEL & CO. v. DUMAS. Viscount Cave.

wilful murder: *Trim Joint District School Board of Management* v. *Kelly* (1); but the word "fortuitous," which is at least as old as *Thompson* v. *Hopper* (2), involves an element of chance or ill luck which is absent where those in charge of a vessel deliberately throw her away. In *Wilson* v. *Owners of the cargo per the Xantho* (3) Lord Herschell said that in order that there might be a peril of the seas "there must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen"; and in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (4) Lord Bramwell approved the definition of Lopes L.J., "it is a sea damage, occurring at sea, and nobody's fault." In *Sassoon & Co.* v. *Western Assurance Co.* (5) Lord Mersey, in delivering the judgment of the Judicial Committee of the Privy Council, adopted a similar view, which is also to be found in the judgment of the Judicial Committee in *Grant, Smith & Co.* v. *Seattle Construction and Dry Dock Co.* (6) On this view the expression "perils of the sea," while it may well include a loss by accidental collision or negligent navigation, cannot extend to a wilful and deliberate throwing away of a ship by those in charge of her.

Against this strong current of authority there is to be set the decision of the Court of Appeal in *Small* v. *United Kingdom Marine Mutual Insurance Association.* (7) There, in an action by a mortgagee under a policy of marine insurance, it was alleged by way of defence that the ship had been wilfully cast away by her master, who was also a part owner and mortgagor; and upon the argument of the preliminary question whether this plea was a sufficient defence to the claim, it was held by the trial judge (Mathew J.) that, assuming the plea to be true, the loss was due to barratry and the mortgagee, who had taken part in appointing the

(1) [1914] A. C. 667.
(2) 6 E. & B. 937; E. B. & E. 1038, 1045.
(3) (1887) 12 App. Cas. 503, 509.
(4) (1887) 12 App. Cas. 518, 526.
(5) [1912] A. C. 561.
(6) [1920] A. C. 162.
(7) [1897] 2 Q. B. 42, 311.

master, could recover on that ground. On appeal, the Court of Appeal agreed with that decision, but also expressed the opinion that, if the mortgagee had taken no part in appointing the master, he could have recovered as for a loss by "perils of the sea." With the latter opinion I am unable to agree. It appears to me to be inconsistent not only with the statute afterwards passed, but also with the decisions of this House and of the Judicial Committee; and I think that *Small's Case* must stand on the ground of the barratry alone. In the present case there is no question of barratry, the owner having been a party to the fraud and the mortgagee having taken no part in appointing the master and crew.

With regard to the general words "and of all other perils, etc.," it has been repeatedly held that they are to be construed as applying to perils of the same kind as those which have been previously specified: see *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1), where the decisions are reviewed; and this rule has now been made statutory: Marine Insurance Act, 1906, Sch. I., r. 12. It follows that a loss by scuttling is not covered by those words.

For the above reasons I am of opinion that this appeal fails on the ground last stated, and I move your Lordships that it be dismissed with costs.

Viscount Finlay. My Lords, this action was brought to recover for a total loss on the steamer *Grigorios* on behalf of the owner, Anghelatos, and a mortgagee, Percy Samuel, upon a marine risks policy. The vessel foundered off the south coast of Spain on February 26, 1921.

The case was tried before Bailhache J. He found that the vessel was scuttled by the master and engineers and some of the crew, with the connivance of the owner, Anghelatos. Anghelatos did not appeal against this decision. This, of course, disposed of any claim by the owner, but the case has been proceeded with on behalf of the mortgagee, who was not in any way implicated in the fraud of Anghelatos.

The vessel had been British, but was taken off the register

(1) (1887) 12 App. Cas. 484.

H. L. (E.) 1924

P. SAMUEL & Co. v. DUMAS.

Viscount Finlay.

on being bought by Anghelatos, who is a Greek subject, and was provisionally recognized as a Greek vessel. The first issue raised was as to the existence of the mortgage. Bailhache J. found, though there was no legal mortgage according to Greek law, that Anghelatos had entered into a valid agreement with Samuel for a mortgage to secure his advances, and that the latter had a right to call for a mortgage to be executed with all proper formalities. He therefore found that Samuel had an insurable interest as mortgagee. The Court of Appeal agreed with him, and I take the same view.

It was further objected to Samuel's claim that he took the policy of insurance as assignee from Anghelatos. If this had been the case, the assignee would be on no better footing than the assignor. This point, however, is disposed of by the finding of Bailhache J., with which the Court of Appeal agreed, that the policy had in fact been effected on behalf of Samuel, the mortgagee, as well as on behalf of Anghelatos the owner. His title therefore would not be impaired by the fraud of Anghelatos, as he took directly from the insurers. I proceed upon the basis that this finding also is correct.

A third objection was made based on the allegation that the insurance was made subject to a condition and that the condition had been broken. This condition is contained in the 22nd of the Institute Time Clauses, which are attached to the policy: Appendix, p. 232. It was alleged that the assured had violated this condition, inasmuch as on a war risks policy he had insured the freight f.i.a. in excess of the amount permitted by cl. 22. Bailhache J. overruled this objection, because, as he said, the further insurance on a war risks policy could not affect the underwriter upon the marine risks. The Court of Appeal, however, held that the condition had been broken, as the object of the clause was to guard against persons who made over insurance, p.p.i. or f.i.a., in respect of any risk whether within or without the marine risks policy. The Court of Appeal accordingly entered judgment for the underwriters on this point, holding that by the infringement of this condition the policy was avoided.

I agree with the view which the Court of Appeal took of the meaning of this clause. It was, however, urged that one of the underwriters on the policy sued on, Dumas, was a party to the further insurance, and it was argued for the plaintiff that this concurrence by Dumas in the further insurance prevented him from treating it as avoiding the policy sued on. I do not think that this "waiver," as it was called, is established on the materials before the House, but I do not rest my decision upon cl. 22. In my opinion, all the defendants are entitled to judgment upon another and a much broader ground.

The action was brought, as I have said, on behalf of the owner and on behalf of the mortgagee. Any claim on behalf of the owner is of course out of the question, as it was he that scuttled the ship. Can the innocent mortgagee recover —can he, in virtue of his independent right as one of the assured under the policy, claim in respect of the loss of the vessel? This will be found to resolve itself into the inquiry whether the loss can be considered as a loss by perils of the sea. The loss was not by barratry, as the captain, in destroying the vessel, was acting under the orders of the owner, and the captain was not in the service of the mortgagee. It follows that, to recover, the mortgagee must show that the sinking of the vessel by the entrance of the sea water which followed from the scuttling can be considered as a loss by perils of the sea, as otherwise the loss would not be from a peril covered by the policy.

The answer to this question must primarily depend upon an examination of the language of the Marine Insurance Act, 1906. When the law has been codified by such an Act as this, the question is as to the meaning of the code as shown by its language. It is, of course, legitimate to refer to previous cases to help in the explanation of anything left in doubt by the code, but, if the code is clear, reference to previous authorities is irrelevant. Lord Herschell put this point with great force and clearness in the *Bank of England* v. *Vagliano Brothers* (1), and there

(1) [1891] A. C. 107, 144–5.

H. L. (E.) 1924

P. SAMUEL & Co. v. DUMAS.

Viscount Finlay.

can be no doubt that his statement of the law there made is correct.

I therefore begin with the examination of the Marine Insurance Act itself. The relevant passages are three in number—ss. 3, 55, and the seventh of the rules for construction of policy contained in the First Schedule to the Act.

The third section of the Act provides that there is a marine adventure where any ship or goods are exposed to maritime perils, and defines maritime perils as follows: "'Maritime perils' means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seisures, restraints and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy."

If entrance of water in consequence of scuttling by the owner is a "maritime risk" it must be because it is included under the term "perils of the seas," which is the first in the enumeration of the varieties of maritime risks. There is no other head in the clause under which it could fall apart from barratry.

I turn to s. 55 of the Act: "55—(1.) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against. (2.) In particular,—(*a*) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew."

By sub-s. 1 of this clause the insurer is liable for any loss proximately caused by a peril insured against. It is obvious that the proximate cause of the loss, and indeed its only cause, was in the present case the act of scuttling. It was for the purpose of letting in the sea water that the holes were

made, and all that followed was the inevitable consequence of what had been so done. There is a marked distinction between such a case as the present and a case where the hole has been made by negligence—e.g., by carelessly leaving a valve open, as in *Davidson* v. *Burnand*. (1) In that case the weight of the cargo brought the discharge pipe below the water level, and in consequence of a valve being negligently left open water entered from the discharge pipe and damaged the cargo. That clearly was an accident incident to the carriage of goods, while in the present case the hole was wilfully made for the purpose of letting in the water. In another reported case arising under a bill of lading, rats gnawed a hole in a pipe which passed through the rice cargo, with the result that sea water entered and damaged the rice: *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2) In that case also the hole was the result of an accidental cause incident to the carriage of goods on a ship. If a man for the purpose of damaging the rice had made the hole in the pipe the damage would have been the result of an act directed by human intelligence for the very purpose and there would be nothing in the nature of an accident about the occurrence. I use the word "accident" in its ordinary sense and not in the somewhat artificial sense in which it has sometimes been used in cases relating to Acts for Compensation of Workmen.

The terms of the seventh of the rules for construction of policy in the First Schedule to the Act are directly in point: "7. The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves."

The scuttling of this vessel occurred on the seas, but it was not due to any peril of the seas; it was due entirely to the fraudulent act of the owner. The scuttling was not fortuitous, but deliberate, and had nothing of the element of accident or casualty about it. Storms are "fortuitous"; the ordinary action of the waves is not, and fraudulent scuttling is even more decisively out of the region of accident.

(1) (1868) L. R. 4 C. P. 117. (2) 12 App. Cas. 518.

H. L. (E.) 1924

P. SAMUEL & Co. v. DUMAS.

Viscount Finlay.

The entrance of the sea water cannot for this purpose be separated from the act which caused it.

I might rest my judgment simply on the terms of the statute, which show that a peril of the seas must be fortuitous, while here the sea water was let in deliberately. But as the greater part of the argument has been devoted to a discussion of the authorities apart from the statute, it is desirable that I should deal also with this aspect of the case. I may observe, however, that the authorities relied upon by the appellant were anterior in date to the Marine Insurance Act, the latest being in 1897, and, on the view of Lord Herschell as to the effect of a codifying act, any earlier authorities inconsistent with the terms of the Act would cease to apply when it came into operation.

The main authority relied upon by the appellant is *Small's Case*. (1) That case was heard by Mathew J., and his decision proceeded entirely on the ground of the barratry of the master, which was covered by the express terms of the policy. He said: "The mortgagee in this case" (Small) "took part in placing Wilkes in the position of master; and Wilkes, if he committed a barratrous act, would be guilty of a fraudulent breach of trust against his mortgagee as well as against his co-owners." The underwriters appealed. Both Lord Esher M.R. and A. L. Smith L.J. agreed with the finding of Mathew J. that Small had taken part in the appointment of Wilkes as captain, so that the act of Wilkes would be barratrous as against Small just as it was against the co-owners. On that view the case has no application to the appeal now under consideration. But both Lord Esher and A. L. Smith L.J. in their judgments put the case in the alternative, saying that if Wilkes was not appointed by Small then Small could have recovered as for a loss by a peril of the seas. This was not at all necessary for the decision, but the appellants in the present case are quite entitled to say that these two eminent judges did give it as an alternative reason for supporting the decision of Mathew J. This House, however, is certainly not bound by what they

1) [1897] 2 Q. B. 42, 46, 311.

said, although any opinion expressed by either of these two very eminent masters of maritime law deserves the most respectful consideration. Nor has there been any such general acceptance of the doctrine as to cause any difficulty as to overruling it, if in the opinion of this House it is erroneous.

In my opinion, the view so expressed was erroneous and did not correctly state the law as it stood before the Marine Insurance Act, 1906. The true view of the common law on this point is that which is embodied in the Act itself. The sea water cannot in a case of scuttling be regarded as the cause of the loss. The cause was the fraudulent act which admitted it into the ship.

The view that the proximate cause of the loss when the vessel has been scuttled is the inrush of the sea water, and that this is a peril of the sea, is inconsistent with the well-established rule that it is always open to the underwriter on a time policy to show that the loss arose not from perils of the seas but from the unseaworthy condition in which the vessel sailed: see Arnould on Marine Insurance, s. 799. When the vessel is unseaworthy and the water consequently gets into the vessel and sinks her, it would never be said that the loss was due to the perils of the sea. It is true that the vessel sank in consequence of the inrush of water, but this inrush was due simply to the unseaworthiness. The unseaworthiness was the proximate cause of the loss. Exactly the same reasoning applies to the case of scuttling; the hole is there made in order to let in the water. The water comes in and the vessel sinks. The proximate cause of the loss is the scuttling, as in the other case the unseaworthiness. The entrance of the water cannot be divorced from the act which occasioned it.

The view of the law on this point put forward by the appellants is also inconsistent with the decision of the Judicial Committee of the Privy Council in *Sassoon & Co.* v. *Western Assurance Co.* (1) In that case opium stored in a wooden hulk moored in a river was damaged by water

(1) [1912] A. C. 561, 563.

H. L. (E.) 1924 P. SAMUEL & Co. v. DUMAS. Viscount Finlay.

percolating through a leak caused by the rotten condition of the hulk. There was a time policy on the opium insuring against perils of the sea, but it was held that the plaintiff could not recover for the loss. The case was tried in His Majesty's Supreme Court in Shanghai, and it was there decided that the damage was not due to sea peril at all, but simply to the weakness of the hulk. The Judicial Committee affirmed this ruling. Lord Mersey said in delivering the judgment of the Privy Council: "There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea. Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss." Lord Mersey then quoted what was said by Lord Herschell in *The Xantho* (1), and concluded, by saying that the damage by sea water was not in any sense due to sea peril, and, therefore, did not fall within the policy. This decision was approved and followed in *Grant, Smith & Co.* v. *Seattle Construction and Dry Dock Co.* (2) Lord Buckmaster, in delivering the judgment of the Judicial Committee, said, after citing *The Xantho* and *The Sassoon* cases: "It is just as though a vessel, unfit to carry the cargo with which she was loaded, through her own inherent weakness, and without accident or peril of any kind, sank in still water. In such a case recovery under the ordinary policy of insurance would be impossible."

Collins L.J. in the case of *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (3) expressed himself as follows: "The wilful default of the owner inducing the loss will debar him from suing on the policy in respect of it on two grounds . . . . first, because no one can take advantage of his own wrong, using the word in its true sense which does not embrace mere negligence . . . . secondly, because the wilful act takes from the catastrophe the

(1) 12 App. Cas. 503, 509. (2) [1920] A. C. 162, 171.
(3) [1898] 2 Q. B. 114, 127–8.

accidental character which is essential to constitute a peril of the sea. 'I think,' said Lord Halsbury in *Hamilton* v. *Pandorf* (1), 'the idea of something fortuitous and unexpected is involved in both words "peril" or "accident."' As regards the first of the two grounds referred to in this passage, it is to be observed that the mortgagee was in no way party to the fraud of the owner in the present case. The first ground would therefore be applicable to him only if in the circumstances of this case the mortgagee is to be considered as so identified with the owner whose wilful misconduct brought about the loss as to be incapable of taking advantage of it. It is not necessary to decide whether he was so identified in the present case, and I reserve my opinion upon it. Lord Collins' second ground is in terms applicable to the present case. The loss was directly due to the wilful and deliberate act of the owner, and there was nothing of the accidental element which is essential to constitute a peril of the sea.

In the case of *Cullen* v. *Butler* (2) the Court doubted whether the loss of a vessel which sank from the fire of a man-of-war which mistook her for an enemy was a loss by perils of the seas, but held the loss recoverable on a special count stating the facts. This case formed the subject of some very illuminating comments by Lord Herschell in *The Xantho*. (3) One passage is so apposite to the present case that I venture to cite it: "I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose

(1) 12 App. Cas. 518, 524. (2) (1816) 5 M. & S. 461.
(3) 12 App. Cas. 503, 509.

H. L. (E.) 1924 P. SAMUEL & CO. v. DUMAS. Viscount Finlay.

of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler* (1), where a ship having been sunk by another ship firing upon her in mistake for an enemy, the Court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases."

It will be observed that Lord Herschell emphasises the point that it is necessary to constitute a peril of the seas that there should be something in the nature of a casualty or accident. He gives as instances extraordinary violence of the winds and waves, striking upon a sunken rock, foundering as the result of a collision with another vessel even when the collision resulted from the negligence of that vessel, and he summarizes by saying that he is aware only of one case which throws doubt upon the proposition that "every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea." He adds that the expression of opinion in *Cullen* v. *Butler* (1), the case he referred to,

(1) 5 M. & S. 461.

stood alone and had not been sanctioned by subsequent cases. Lord Herschell treats the firing upon the vessel in *Cullen* v. *Butler* (1), owing to her being mistaken for an enemy, as an accident, which supplied the fortuitous circumstance necessary to constitute a peril of the sea. The possibility of scuttling is not a peril of the sea; it is a peril of the wickedness of man, and would have to be mentioned expressly in the policy, like barratry or pirates, in order that the assured should recover from the underwriter in respect of it. If the scuttling is carried out by the captain and crew in fraud of the owner it is an act of barratry and the owner may recover under the policy, which ordinarily enumerates barratry as one of the perils insured against.

Sir John Simon cited a remark made in the judgment of Lord Campbell in *Thompson* v. *Hopper*. (2) In commenting upon a plea alleging personal misconduct of the plaintiffs which produced the loss, Lord Campbell said: "The plaintiffs' counsel said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled or sunk by being wilfully run upon a rock." It is true that the sea in all these cases would be the actual agent of destruction, but this does not make the loss a loss by perils of the seas. As pointed out by Scrutton L.J., in his judgment, the question as to proximate cause is really as to what is the dominant or effective cause; in the present case it was of course the scuttling, and that is not a "peril of the sea."

A dictum of Lord Ellenborough in *Heyman* v. *Parish* (3) was also cited. That dictum was a criticism of a ruling of Buller J. on the question whether, if a plaintiff declared for a loss by perils of the seas and it turned out that it was the result of barratrous misconduct in the navigation of the vessel, the plaintiff could recover. Reference was also made to *Dudgeon* v. *Pembroke*. (4) In that case a vessel encountered very bad weather and was lost. It was alleged that she was unseaworthy, but it was decided that a loss

(1) 5 M. & S. 461.
(2) 6 E. & B. 172, 191–2.
(3) 2 Camp. 149.
(4) 2 App. Cas. 284.

H. L. (E.) 1924 P. SAMUEL & Co. v. DUMAS. Viscount Finlay.

caused immediately by the perils of the seas is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy. Neither of these cases appears to me to have any material bearing upon the present.

Upon the whole I arrive at the conclusion that there was no loss in this case by a peril insured against, and that the appeal must fail upon that ground.

LORD SUMNER. My Lords, your Lordships have held that the mortgagees in this case were independently insured by the defendant and are not entitled simply through the mortgagor and by derivation from him, and further that they had a separate insurable interest in virtue of their agreement with the mortgagor, which gave them the right to call for a regular and legal mortgage, a right enforceable by legal process.

I concur in both points, though as to the first, had I tried the action, I think I should have decided otherwise, for the written agreement provides for a derivative insurance only, the mortgagor insuring himself and giving the mortgagees the benefit of his insurance, and the evidence does not prove a clear departure from this arrangement. The conversations proved are ambiguous, for Mr. Samuel, the mortgagee, whose intention, and not that of his broker, was the intention that really mattered, only said in substance that proper policies were to be effected, and the point that this policy was treated exactly as policies were treated in which the mortgagees had no insurable interest—namely, those on freight and disbursements—and was held by the mortgagees along with them, apparently as collateral security, has received less attention than I think it deserves. The question is, however, one of fact, and I should not presume to differ from your Lordships' view upon it.

To the independent claim of the mortgagees thus established the defendant raises two defences, the first that the loss was not proximately caused by any peril insured against, and the second that, even if it was, the insurer's liability

is unenforceable by reason of the fact that a condition incorporated in the policy—namely, No. 22 of the Institute Time Clauses—was not fulfilled. Both questions are of importance, the former because it involves a radical reconsideration of a part of the law of marine insurance which has long been thought to be settled, the latter because, in consequence of a reply of waiver of the condition, the practical business of underwriting is seriously affected.

That this loss was not a loss by perils insured against, that is to say of the sea, is argued for the respondents under two heads: (1.) that the peril was not fortuitous and accidental, but that the loss was deliberately designed, and (2.) that the loss was not proximately caused by foundering at sea, but was proximately and solely caused by the act of scuttling the ship. The argument was approved both by Bailhache J. (so far as his own opinion went) and by Scrutton L.J. The former, however, says in his judgment in the present case, that the incursion of sea water would in the circumstances be a peril of the sea, but, being due to the action of the owner or his agents in scuttling her, it would be a risk not covered by the policy. This is consistent with saying that the guilty owner fails to recover on the policy because he is guilty and not because the loss is not otherwise a loss by perils insured against. Scrutton L.J. says, first, "there must be a peril, an unforeseen and inevitable accident, not a contemplated and inevitable result," though in fact, whether the matter was one of accident or design, the result was not in either event inevitable; and secondly "when a stranger and still more an owner directly and intentionally lets sea water into a ship the dominant, effective or proximate cause of the loss is the deliberate action of the owner and not any peril of the sea." This proposition is framed to cover the intentional action alike of the owner or of a stranger, which, I think, is strictly logical. The reasoning seems to be this. A loss arising out of such action is a loss outside the words of an ordinary Lloyd's policy, because the action is intentional, the outcome of human volition. Man, not inanimate nature, is the cause of such a loss. It issues from the conscious working

H. L. (E.) 1924

P. SAMUEL & Co. v. DUMAS.

Lord Sumner.

of the human will and not from the haphazard operation of natural forces.

To these weighty opinions may, I think, be added two observations by Mr. McNair, the respondent's junior counsel, which are well worthy of attention, for they put the points freshly. The one is that a wicked scheme carried out with mens rea is not really a chance at all; it is a certainty. Of course it may fail and be defeated, but, if it succeeds, it succeeds through human machination. The other is that if, say, the sinking or burning of a ship was a loss by perils of the sea or by fire, even though the master or crew swamped or kindled her, barratry in a large number of cases of loss is an otiose addition to the perils insured against.

My Lords, I cannot understand how these propositions are to be reconciled with the well-established law applicable to collision cases. Neither the deliberation nor the wickedness of the action, which produces the collision, appears to affect the right of owners, who are insured, to recover as for a loss by perils of the sea. Two ships on crossing courses collide and sink. Either navigating officer may have kept his course and been right or have kept his course when he should have given way. He may have kept his course when, being in liquor, he was oblivious of the other ship's existence. In each case his action is the same: he steers the ship exactly where he meant to steer her and by being where he elected to place her she is cut down and founders. The result also is the same whatever his state of mind, and neither his negligent navigation nor his liability to be indicted for manslaughter affects the right of owners of ship and cargo to recover from their underwriters. If the matter goes a little further and the navigator of the give-way ship, being inflamed by his liquor, stands on and vows he will sink the other rather than give way, he may, I suppose, be hanged for murder, but his owners will be indemnified just the same; at least I know no authority which decides the contrary. In each case the officer has done what he designed to do; in one intending to sink the other ship and take his chance of sinking his own. In all of them he

has thus far intended the consequences of his action that he has proposed to take the consequences whatever they may be, yet in all of them the loss is a loss by perils of the sea. To take one case more, there are situations in which it becomes the duty of a navigator to steer into and collide with a floating object to avoid collision with a third. For insurance purposes the result is the same. It is not true to say that he has no choice; the truth is that he has his choice and makes the right one, with the same consequences as before. In all these cases the action taken by the navigator is the same, and is persisted in up to and into the actual collision; the difference is purely in his state of mind, and ranges from conscious rectitude through panic and intoxication to crime. How can the law applicable to such cases consist with the proposition contended for? An act has been intentionally done, which let in the water, as it might be expected to do, and yet loss resulting from that act is a loss by perils of the sea. If, further, the navigator in each of the above cases be the sole owner of the ship he, of course, is defeated on proof that he shaped his course with a view to getting judgment in his favour on the policy; but as everything else is the same, except that in the case now supposed the ship is his property and he has insured her, I cannot see how the mere cause of the loss is not the same in this case as in the rest. Surely the difference does not depend on the fact that instead of an indictment for manslaughter the indictment of the owner is one based upon fraud.

I could put other cases, but do not think anything would be gained by them, nor does it appear to me to help the argument to say that in some of these cases there might be a loss by barratry. There is a good deal of overlap in the wording of a Lloyd's policy, and the same event may give cargo owners indemnity under perils of the sea and shipowners an alternative indemnity under barratry. Thus there is very old authority for saying that cargo owners cannot recover as for barratry, when the barratrous act leading to the loss was assented to by the shipowner, for it is of the essence of barratry that the shipowner is wronged, and he is not

H. L. (E.) 1924

P. Samuel & Co. v. Dumas.

Lord Sumner.

wronged when he consents: *Stamma* v. *Brown* (1); *Nutt* v. *Bourdieu*. (2) In such a case I think the cargo owners recover for a loss by perils of the seas, but on the respondents' argument they have no remedy except against the shipowner and the captain. Contracts of indemnity are intended to make good losses where they happen in certain events, and except where, as with barratry, culpability is a quality of the cause of loss itself, they are not concerned with the guilt or innocence of the action. Loss attributable to the wilful misconduct of the assured is not excluded by any actual term of the contract. There is a restriction placed by law on the right to recover upon it, in order that a contract of indemnity may not serve as an instrument of fraud.

It is then said on the one hand that the very definition of a peril of the sea excludes from the term the operation of wilful misconduct, whether of the assured or of anybody else; that the expression is "perils of the sea," not "perils on the sea"; and on the other, that, according to the decisions, the wilful murder of a workman may, as an accident, be a ground for compensation to his widow, which is not unlike an accidental loss under a policy. My Lords, I have failed to find either of these arguments helpful. Nor do I think much is to be gained by reference to the decisions themselves in *The Xantho* (3) and *Hamilton & Co.* v. *Pandorf & Co.* (4) Sir Robert Phillimore points out in *The Chasca* (5) that the analogy between bill of lading cases, as those cases were, and insurance cases is fallacious. The words "perils of the sea" have the same meaning in both instruments, but on the question of the cause of loss different rules and reasoning apply. Of course perils of the sea are not the same as perils on the sea, but in law epigrams only dazzle, and as for decisions on the Workmen's Compensation Act, they shed even on that Act an illumination which is sometimes dim. In marine insurance we shall do better with the light of reason.

(1) (1742) 2 Str. 1173.
(2) (1786) 1 T. R. 323.
(3) 12 App. Cas. 503.
(4) 12 App. Cas. 518.
(5) (1875) L. R. 4 A. & E. 446.

The interpretation of the term "perils of the seas" is now statutory and is subject to the provisions of the Act, including s. 55. Perils of the seas refer to accidents or casualties of the seas, so, evidently, accident or casualty is the point of the definition. Fortuitous, probably, adds nothing to either substantive. A fortuitous casualty is a matter of chance, a mischance; but in causation there is no chance. The effect is caused, it does not happen. Along this line the interpretation seems to carry us no further. If the chance refers to something not to be expected and not to be precisely foreseen something may be made of the term. When a ship has a hole in her below the waterline, if nothing is done to close it, probably she will eventually sink, and the point at which she sinks is the point at which the entrance of water passes from what she can carry to what she cannot. In fact that is what makes her sink. That point is capable of determination if sufficient data are known. Her ultimate fate is a matter of the intervention of something to stop the inflow before that point is reached. What difference does it make how the hole was made, by negligence or by crime, by impact of heavy cargo slipping from the slings, or contact with floating submerged wreckage? Given the hole and the water, nature does the rest. I am speaking, of course, of such a case as the present; if all the time that the water was rushing in, the fraudulent owner was busily enlarging the hole with an axe, possibly this simultaneous joint causation might affect the matter, especially in view of the special language of some policies. Here, however, I do not see how it can be affirmed that the ship did not go to the bottom by getting too full of water, whether the owner let the water in at the beginning or not.

In the present case the owner's part was played and played out before the ship left Philippeville. We do not know exactly what the plotters on board did. The learned judge says that an entrance for the water might have been arranged before the cargo was loaded. It might have been brought about by opening seacocks or tampering with valves immediately before the alarm was given. Many hours elapsed from the

H. L. (E.) 1924 P. SAMUEL & Co. v. DUMAS. Lord Sumner.

time of sailing to the time of the fictitious explosion; thirteen more passed from that time before the ship sank, and during those thirteen hours she was slowly filling. For a long time she was in no danger. Even if the inflow of water could not have been cut off, the pumps would have overcome it. The attempt to tow would probably have succeeded, if it had been made earlier. One need not know much about the sea and about ships to realize that the sinking was by no means an inevitable result of contriving the aperture. Floating chips constantly get into and choke inlet valves. Again, a ship might, with the movement of the sea, and a shift of cargo, take a list that would lift this unknown aperture above the water-line. It is true that in the interval very little actually happened, though the chapter of accidents might have been a long one, but the interval is significant. To say that the proximate cause of the sinking was the instructions given by Anghelatos and was not the entrance of water seems to me to give a new meaning to proximate cause, and if for this purpose the acts of his agents on board are regarded as his acts I think the result is still the same. A ship is none the less burnt and destroyed by fire because the striking of the match was an act of arson. There is authority for saying that fire voluntarily caused to avoid capture is recoverable as a loss by fire: *Gordon* v. *Rimmington* (1), just as there is old authority that loss by pirates can be recovered under perils of the seas (see Arnould, 10th ed., §§ 836, 837), and I think it is plain that Lord Herschell would have held in *Cullen* v. *Butler* (2) that a ship sunk by gunfire is lost by perils of the sea, for she is lost by incursion of seawater due to her coming accidentally (in the popular sense of the word) into contact with a cannon-ball. To my mind the real significance of the statutory interpretation is shown by the second sentence in r. 7, which is in antithesis to and is complementary of the first. Accidents are not what is ordinary; what will happen more or less in any case is not fortuitous. To say that, if you make a hole under water, water will ordinarily come in, is only a gibe. That is an extraordinary manner for water to enter

(1) (1807) 1 Camp. 123. (2) 5 M. & S. 461.

a hold at sea. To say that scuttling is not a peril of the sea because it has nothing to do with the seas except that they are the scene on which the drama of crime is played out, appears to me also to be playing with words. Negligence in navigation is not in this sense "of the seas," though it is pretty common at sea. It is more uncommon to find an owner, who is an Anghelatos, yet foundering is a peril of the sea in the case of a ship negligently navigated and it must be so equally, if she is deliberately holed.

Scrutton L.J. uses language which seems to suggest that recent decisions have altered the rule as to causa proxima and have even to some extent substituted the rule of causa remota. I hardly think this is so. The rule is statutory, and Courts have to apply, not to change it. If recent applications have not been altogether consistent with older ones I do not think that was intended, though no doubt it is in the unintended and unforeseen effects of reported decisions that judge-made law finds its most interesting development. Where a loss is caused by two perils operating simultaneously at the time of loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates. It is then convenient and even necessary to test the application of the term "proximate" otherwise than by sequence in time, and attempts, more or less successful, have been made to explain it by using other adjectives, but the rule remains. I doubt if the present question would ever have been disposed of in favour of the respondents simply by saying that the hole had to be made first and then the water came in afterwards. Accordingly the explanation of the two cases cited in this connection, *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1) and *Reischer* v. *Borwick* (2), I think, is this. In the former, where the question was really one of fact, the pressure of the water overcame the resistance of the bulkhead and the ship filled and sank, but it was the explosion of the torpedo which admitted that pressure to the bulkhead.

(1) [1918] A. C. 350, 358. (2) [1894] 2 Q. B. 548.

H. L. (E.) 1924 P. SAMUEL & Co. v. DUMAS. Lord Sumner.

Thus there were two concurrent causes proximately operating —namely, the opening of the ship's side and the pressure of the sea—and the policy, being free of the consequences of the former, it was free of this loss, though, if the insurance had been against perils of the sea and no more, the loss would have fallen within it. So in the other case. The policy was against collision and damage received in collision only, and it could not be denied that the vessel was damaged in collision. It took two things to sink her: the hole made in collision and water flowing into it. They were both immediate and concurrent causes, and if either was within the policy, the assured recovered. If either of these cases goes beyond this, it does not merely rename causa proxima and try to put it into English, but substitutes for it causa causans, whether proxima or not, which is in the teeth of the Act.

Before passing to s. 55 of the Marine Insurance Act may I say a few words about the decided cases? So far as I know there is no case which actually decides either of the propositions upon which the respondents rely. *Sassoon's Case* (1), approved in *Grant, Smith* v. *Seattle Construction and Dry Dock Co.* (2), is not really in point. The hulk was not navigated but was used as a floating store, and was so old and rotten that she could no longer withstand the pressure of the water in which she floated. The allusion to the absence of fortuitous circumstances made by Lord Mersey does not mean that nothing can be a peril of the sea that does not happen by chance (whatever that may be), but that nothing except the rottenness of the hulk let in the water. So it is in cases on time policies, where the loss is directly caused by unseaworthiness, for then it is plain that the loss was a certainty, whatever the state of the weather or the sea, and, as has been often said, perils of the sea refer to things that may happen, not to things which must happen in the ordinary course of navigation.

There is also the well-known passage in the opinion of Collins L.J. in *Trinder's Case* (3), which was much relied

(1) [1912] A. C. 561. (2) [1920] A. C. 162.
(3) [1898] 2 Q. B. 114, 127.

upon. In spite of my respect for the lightest dictum of that great judge, the words themselves seem to me to be self-contradictory. The assured must prove a loss by perils insured against or fail. If it be true that his "wilful act takes from the catastrophe the accidental character which is essential to constitute a peril of the seas," then simply on proof of this wilful act he fails, because the words of the contract do not cover the loss. Forbidding him to take advantage of his own wrong is another matter, for this means that something, which in itself would be his of right under the contract, is denied to him, because the law is more moral than the contract. Of course, it is true that he cannot take advantage of his own wrong, or as it is sometimes put "Dolus circuitu non purgatur." This, however, seems to me to be obviously a case of personal disability, which cannot affect persons, who are neither parties to the dolus nor stand in the guilty person's shoes. Fraud is not something absolute, existing in vacuo; it is a fraud upon some one. A man who tries to cheat his underwriters fails if they find him out, but how does his wrong against them invest them with new rights against innocent strangers to it?

It is impossible to study the judgments of A. L. Smith L.J., in the same case, and of Kennedy J. in the Court below, without seeing how carefully both avoid saying that the exclusion of the assured from recovering on the policy for a loss attributable to his wilful misconduct has anything to do with the fortuitous character of perils of the sea. Kennedy J. says (1): "In regard to the conduct of the assured exonerating the underwriters, the line, in my judgment, is to be drawn at acts which are done knowingly or wilfully, or, at the least, with a reckless disregard of possible risk to the safety of the subject of the insurance." A. L. Smith L.J. says (2) that, when the loss is occasioned by the wilful act of the assured, "Causa proxima, non remota spectatur" does not apply at all. I think "exoneration" is not the word to use for not being liable, because the loss is not

(1) (1897) 66 L. J. (Q. B.) 802, 804. (2) [1898] 2 Q. B. 114, 124.

H. L. (E.) 1924 P. SAMUEL & CO. v. DUMAS. Lord Sumner.

by any peril insured against, and, if proximate cause does not apply, it must be because the policy is subjected to an exceptional rule of law to prevent the assured from profiting by his own misconduct, but no further.

If there are not decisions there certainly are dicta to the contrary of the proposition contended for—e.g., Lord Ellenborough's opinion in *Heyman* v. *Parish* (1) and Lord Campbell's opinion quoted from *Thompson* v. *Hopper*. (2) In *Thompson* v. *Hopper*, Lord Campbell, with the concurrence of Coleridge and Wightman JJ., said in terms that, "if the ship had been scuttled or sunk by being wilfully run upon a rock," the loss would have been a loss by perils of the seas, a proposition not contested for over sixty years. That case is so largely quoted and adopted in *Dudgeon* v. *Pembroke* (3) that the absence of any criticism on Lord Campbell's observation is strong ground for believing that it was taken to be the law, and in the Court of Queen's Bench Blackburn J. quotes these very words with approval. When the judgment of that Court was restored in your Lordships' House, Lord Penzance, with the concurrence of Lord Cairns L.C. and Lord Blackburn, says, "any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it," and then, passing to *Thompson* v. *Hopper* (2), adds that it is the only case which establishes an exception to this liability—the liability that is for losses immediately caused by perils of the seas—and that in this exception the knowledge and wilful misconduct of the assured himself was an essential element in the decision. This appears to me to be fatal to the contention that scuttling by a stranger to the insurance sued upon prevents the sinking from being a loss by perils of the seas at all, for why otherwise speak of "the assured himself"? In fact, loss by perils insured against, though brought about by the felonious act of a third party, has been held to be a loss within a fire policy: *Midland*

(1) 2 Camp. 149.
(2) 6 E. & B. 172, 191–2.
(3) 2 App. Cas. 284, 297; L. R. 9 Q B. 581, 593–4.

Insurance Co. v. *Smith.* (1) Is it to be taken that this case is to be overruled ?

I think, however, there is a direct authority—namely, *Small* v. *United Kingdom, &c., Insurance Co.* (2) The contention that a loss by the wilful misconduct of Wilkes, which was by order assumed to be the fact, could not be a loss by perils of the sea was expressly raised in argument before Mathew J. (3), and must, I think, have been before the minds of the Court of Appeal, not merely as an incident in the proceedings below, but as a question lying at the bottom of the entire case. I am not aware that *Small's Case* has been questioned till the present litigation, and certainly it is very well known and the Act contains nothing expressly to the contrary of it. Neither is there, as far as I know, any case, in which innocent cargo-owners have failed to recover for cargo lost at sea with the ship, on the ground that the water was let into her with the owner's privity.

My Lords, whether what is said in *Small's Case* is a decision or a dictum, it is in itself so important, that the Legislature could hardly have failed to put it right, if it were wrong. The subject is dealt with in s. 55. The proposition is that a loss caused by wilful misconduct involving the sinking or burning of the ship is a loss, for which under the ordinary wording the insurer is not liable. Why, if so, does not s. 55, sub-s. 2 (*b*), add wilful misconduct to delay as a proximate cause of loss, for which it expressly states that the insurer is not liable ? Had it done so it would at once have corrected *Small's Case* and have affirmed a general and important rule. Again, if this proposition is true, why does s. 55, sub-s. 2 (*a*), say that the insurer is not liable for wilful misconduct of the assured ? The insurer can only be liable for losses covered by perils insured against, and, if he is never liable for losses caused by wilful misconduct, why specify the particular case and omit to state the general rule ? Why is the language varied and the words "attributable to" used instead of "proximately caused by" ? If the code

(1) (1881) 6 Q. B. D. 561. (2) [1897] 2 Q. B. 42, 311.
(3) 76 L. T. 326.

H. L. (E.) 1924 P. SAMUEL & Co. v. DUMAS. Lord Sumner.

meant to affirm the disputed passage in *Small's Case*, the words in s. 55, sub-s. 1,—" is liable for any loss proximately caused by a peril insured against "—are adequate for the purpose. If the Legislature intended to correct it, that intention failed. Again, if non-liability for losses attributable to wilful misconduct is a personal disqualification preventing the recovery of something otherwise recoverable, the addition of the words " of the assured " is apt ; otherwise it is otiose. On the other hand, as sub-s. 1 states the general rule of liability, first affirmatively and then negatively, and sub-s. 2 begins " in particular . . . ., " the sub-section is the expression of particular cases of non-liability. What is there to show that this expression is not meant to be exhaustive ? Why is loss attributable to some one's wilful misconduct omitted from the code and left to be implied at common law ? As a matter of construction s. 55 seems to me to prescribe that the assured's wilful misconduct is a ground for refusing to him, but to him only, the indemnity, which the proximate origin of the loss would otherwise have brought about. It is to be observed that the whole section is framed to state for what an insurer is liable, that is, upon a policy to a person assured by that policy, and is not framed as a definition of proximate or of remote causes. In fact perils insured against are causes and losses are effects. If the proximate cause of the effect, be it what it may, is not within the perils named in the policy, there is no liability, and no more need be said about it. I cannot see any need for introducing this question of misconduct, unless it is first assumed that the loss has been brought within the policy by being proximately caused by perils mentioned therein. If so, wilful misconduct constitutes a case of exception, but of exception out of the insurer's liability to the assured who has misconducted himself, and not out of the perils covered by the policy, and the statement then becomes relevant to the section, because the object of the section is to declare for what the insurer is liable and for what he is not. Finally, if no loss is a loss by perils of the sea that is caused by human volition and is substantially what has been willed, why should there be a rule at all to

negative liability for losses attributable to wilful misconduct of the assured? The case is only a particular instance of the wider general proposition and is already covered by it.

That the law, common or statute, should declare exceptions from liability, which are not provided for by the words of the policy itself, is nothing new. For example, apart from the custom of particular carrying trades, cargo stowed on deck is excepted out of the protection of a policy on cargo. So in a policy against capture, in time of war British capture is excepted, when the underwriter is a British subject. As it seems to me, though, as it is a somewhat thorny subject, it may be better not to express any decided opinion now, the indubitable freedom of the policy from liability for inherent vice and wear and tear really rests on the principle of special exceptions out of general categories of liability, though I recognize that they may be regarded as being merely instances of a limited interpretation placed upon the named perils. The Act, however, appears to regard them as exceptions from liability, as it does the wilful misconduct of the assured.

My Lords, I find it impossible not to be influenced by the consideration that, if a scuttled ship is not proximately lost by perils of the sea, then every cargo-owner, who loses his goods with her, is as uninsured as the scuttling shipowner. Curious results may follow. An owner-skipper of a craft of small value, laden with, say, bullion, finds his anchor dragging as he lies in shelter and in shallow water, and to save his cargo from total loss if his vessel faces the gale outside and sinks in deep water, blows a hole in her stern and drops her on the mud in four fathoms, where the bullion is easily raised. I take it this, if reasonably done, is a general average sacrifice of the vessel and, subject to the ship's contribution, is directly recoverable from cargo-owners and freighters. Can the captain not recover anything on his hull policy, nor the cargo-owners anything on their cargo policies, a loss by general average sacrifice being a loss by perils of the seas? That result follows from the respondent's argument, but I think it is not a result which underwriters desire or intend. It is true that, as

H. L. (E.) 1924 P. SAMUEL & CO. v. DUMAS. Lord Sumner.

Scrutton L.J. says, to hold the contrary means that underwriters insure cargo-owners against fraudulent casting away of their goods by shipowners. It is true that, as Mr. McNair argued, a cargo-owner is defeated in some other cases by the default of the shipowners—e.g., the unseaworthiness or the deviation of the ship, though he be ignorant of it in fact and powerless to prevent it; then why not in the case of scuttling also? To the first observation I think the answer is that it is the business of an underwriter to take risks, and the risk, an inconsiderable one, of the shipowner's wilful misconduct can be considered in the premium as well as the risk of negligent navigation. Though it is the underwriter's business to take risks, however, he refuses to be swindled. I would add that historically I do not think it is known, whether this exclusion of liability for the assured's wilful misconduct really originates in the layman's construction of his contract or in the lawyer's ethical objection to allowing a man to profit by his own wrong. Quite possibly the case was always so exceptional that, left to himself, the underwriter would have made the best of it. As to the other point, I do not think the cases are parallel. Unless the contract of indemnity is to be absolute and at all events, some normal conditions must be assumed, and in voyage policies these include a definite voyage, definitely pursued, and a carrying vehicle reasonably fit for that voyage. These are not really cases of making an innocent assured bear the consequences of the default of a stranger.

In your Lordships' conclusion that the condition as to the permissible limit of p.p.i. cover on freight has been broken, I entirely concur. I have no doubt that it is intended to exercise and does exercise some useful restraint on persons, who are tempted by the prospects of success in the same walk as that of Mr. Anghelatos, but the question is not what is intended or is effected, but what is said. Clause 22 is one of a code of clauses incorporated bodily into the policy, and that code contains disconnected and self-contained provisions, which the parties think fit to adopt. It is true that the whole policy, the clauses included, must be read

together, but the way in which policies are built up by the addition of isolated clauses or groups of clauses is quite familiar, and the mode of construction is different from that which applies to a continuous instrument, designed as a whole and drawn systematically with all a conveyancer's art. Clause 22 is a warranty, quite different from, say, the f.p.a. warranty. It is a condition; it must be enforced as a condition and exactly complied with, whether material to the risk or not (s. 33 (3.) of the Act): being a condition it can be answered only by performance or by waiver. In my opinion on the evidence it clearly was not performed and the appellants in fact relied on waiver, disregarding the proviso at the end of the clauses.

It was pleaded in the reply that "the insurance against war risks only on freight for six months was effected (inter alia) by the defendant Dumas, who was also" an insurer (inter alios) in respect of marine risks on hull and machinery, and in respect of war risks on hull and machinery and freight, and in respect of both on premiums and demurrage. "The said Dumas thereby waived the said warranty and is estopped from relying upon the same."

How much was made of this plea at the trial we do not know. No evidence was given upon it except that all the slips were put in. The war-risks policies do not appear in the record, but an original example of each of the groups of policies was produced during the argument for your Lordships' inspection. If Bailhache J. appreciated that this point was relied on, he did not think it merited any reference to it in his judgment. All that can be gleaned of its fortunes in the Court of Appeal is that Scrutton L.J., having stated the appellants' contention, dryly adds: "I could not understand how this result followed."

Before your Lordships this point was elaborately made, and, probably for the first time, was one of the main props of the appellants' case. I think your Lordships might well have declined to entertain it. We have not the benefit of the opinions of either Court below, manifestly because the appellants did not think fit to develop this point sufficiently

H. L. (E.) 1924 P. SAMUEL & CO. v. DUMAS. Lord Sumner.

to attract the Court's attention or to make their reasoning intelligible. They called no evidence of actual intention or of knowledge of material circumstances on the part of the defendant. I do not think that your Lordships are bound to decide a point on which the party on whom the burden of proof lies has not elicited the proper evidence or, by explaining the point, obtained clear judicial opinion upon it. I could have wished that your Lordships had refused to consider it under such circumstances.

Estoppel, though pleaded, may be dismissed at once. Mr. Dumas entered into a new contract of insurance; he did not agree upon valuable consideration to modify the old one. He made no representation that he would not rely on the conditions in the first policy and, if he had done so, it would have been only a promise de futuro and not a representation of an existing fact. The appellants did not change their position on the faith of any representation, but no doubt continued to act, after the second slip was initialled on Mr. Dumas' behalf, exactly as they had intended to act before. There was nothing done to encourage the broker to go on completing the freight cover which he had opened, and he simply pursued his own course about it. This is not a case in which the law imputes or presumes any particular intention, and as to any intention in fact I have no doubt that the person who initialled the second slip had at the time no thought and probably no knowledge of the first. It must, in my opinion, be clear that the broker acted by inadvertence when he opened a cover on freight f.i.a. for more than cl. 22 permitted. Why is not the underwriter to be supposed to have been inadvertent too? Unless he is treated on the same footing as the broker in this respect the effect is that one party is bound to a consequence which he did not intend, while the other is relieved from all consequences on the ground that he did not intend them. An anticipatory election to waive a breach in case the amount covered should reach a sum that would involve a breach will not do, while of any actual election there is no evidence at all. No permission was given to the broker to cover as much on

freight as he chose, nor was the condition abrogated by consent or by conduct. The matter is all the more serious for the underwriter, since cl. 22 is a condition or nothing; if waived, it goes entirely. It cannot simply be reduced to a promise, of which the breach will sound in damages. The contention makes an underwriter's position difficult indeed if, without proof of knowledge or intention, he is held to waive something in a prior contract, for when a risk is offered to him his mind is and must be bent on the risk so put before him and on the premium appropriate to it, and it is not reasonable in fact to expect him to have his mind on the terms of other insurances to which he is party, except to see whether he has exhausted the limits which restrict him in taking a further risk. Of course, for the purpose of disclosure an underwriter is deemed to know whatever it is part of the current knowledge of an underwriter to know in the course of his business, but the question here is not a question of disclosure. Of course, too, Mr. Dumas is bound by the acts of his agents and the terms of his contracts, and he abides by both the insurances, which he subscribed, and accepts liability for his agents' acts. The question is what is the effect of what he or his agents did; is it only that he made two distinct contracts or does it go further and alter one, when all that was, in fact, intended was to make another and then observe both? No case was cited which would justify the inference of a waiver from such materials. In the most familiar of examples—waiver of a forfeiture by acceptance of fresh rent with knowledge of the existence of a cause of forfeiture—the mere doing of an act is taken as a conclusive waiver without inquiry into the lessor's actual state of mind, but this is an act, in itself unequivocal, done under the very contract, under which the cause of forfeiture arises, and it is itself an act inconsistent with the prior determination of the contract for that cause: see the observations of Parker J. in *Matthews* v. *Smallwood*. (1) No case was produced in which a like result is held to follow, irrespective of actual intention, where no act is done under the

(1) [1910] 1 Ch. 777, 786.

H. L. (E.) 1924

P. SAMUEL & Co. v. DUMAS.

Lord Sumner.

contract to be affected, but another and independent contract is entered into, which according to its terms, leaves the old contract untouched.

It is said, as I apprehend, first of all, that as the breach of the condition consisted and could only consist in contracting subsequently for an excessive amount of insurance of a particular kind, and as such contracting postulates an underwriter as well as an assured, Mr. Dumas, by taking a line on that subsequent insurance, was art and part in the breach himself, and could not thereafter rely on the condition which he himself had had a hand in breaking. This involves some examination of the war-risks slip and policy so far as they include freight. It is further said that, by executing the marine risks policy, which was done after the war risks cover had been completed for an excessive amount, Mr. Dumas affirmed that the marine risks insurance was still in effect, the excess freight insurance notwithstanding, and thus, by an act inconsistent with an intention to rely on the breach of the condition, in law disentitled himself from doing so thereafter.

I will take first the war risks cover on freight f.i.a. itself, which was initialled on behalf of Mr. Dumas. As a matter of business it is the initialling of the slip which makes the contract and binds the underwriter to execute a policy, and, as a matter of law, rectification of a policy is granted to make it conform to the slip, and the obligation of disclosure has reference to the date of the slip. Except for the purposes of statutory stamp requirements, there need not be a policy at all. A policy was, however, in fact duly issued as the law required (I treat the p.p.i. question as one not before your Lordships) and the legal effect of issuing the policy has to be examined. I would add that no attention was drawn to the payment of the premium on either policy nor is there any evidence about it, and it may well be that, having regard to the substitution of the broker for the assured as the person who alone is debtor for the premium, any evidence about it would for present purposes have been irrelevant. The question is, therefore, whether the subscription of either

document makes Mr. Dumas a party to the breach of warranty.

It appears from the copy of the slip which is in the record that Mr. Dumas is the first underwriter who happens to be on both risks. There may be another before him, but at any rate he is not by any means the only one on both. He, however, is the one selected to be sued and, under the usual agreement to be bound, the fortunes of the others must stand or fall with his. It appears also that, as the slip stood when it had been initialled on his behalf, the limit permissible under the condition—cl. 22—had not been exceeded or reached. As to these questions I have had to use my own experience, since no evidence was given beyond the slip itself, but I think I am right. On the face of the slip it appears that a total "war risks only" cover is contemplated of 110,000*l.* on hull and machinery, 27,500*l.* f.i.a. on freight and 16,500*l.* f.i.a. on disbursements. To any one who had seen and remembered the marine slip initialled, in the case of Mr. Dumas, three days earlier it could be made to appear from these materials that the total insurance of the hull and machinery against marine risks with institute time clauses having been 110,000*l.* for twelve months and the war risks slip being for six months only, the permissible limit of an f.i.a. insurance on freight would be 13,750*l.* I do not believe that any underwriter, with his mind on the question whether he should take a line on the war risk slip or not, would or could make the calculation in fact, and no one gave evidence that he could. After the event it undeniably appears possible, but why it is to be assumed in law that the underwriter knew this I do not know.

As far as the slip is concerned, I think Mr. Dumas is entitled to have it judged as at the moment when it was presented. Within the limit of 13,750*l.* there can be no question of breach of the condition and, if Mr. Dumas' subscription does not pass the limit, there can be no right to impute to him that it made him party to a breach by picking it out afterwards, when other subscribers had raised the total subscribed beyond the limit. At that rate, if he had

H. L. (E.) 1924

P. SAMUEL & CO. v. DUMAS.

Lord Sumner.

been the leading underwriter on the slip he would still have waived the condition. How then is his action to be tested? "A waiver," says Lord Chelmsford L.C. in *Earl of Darnley* v. *London, Chatham and Dover Ry. Co.* (1), "must be an intentional act with knowledge." It is a question for a jury unless the facts are undisputed: *Davenport* v. *The Queen.* (2) The name of the ship was on both slips; the name of Anghelatos was only on the marine risks slip; the other slip named no assured. At most he had means of inferring that the assured was probably the same person, since the same broker was employed, and who could wish to pay premiums on 110,000*l.* on hull and machinery, against war risks only except the person who had covered the same sum on the same subject matter against marine risks f.c. and s.?

He might then recall the terms of cl. 22, which are intricate, note that the time for the second cover is half that of the first, and having done the arithmetic in his head, say "My proportion will not make this insurance on freight, up to and inclusive of my line, as much as 13,750*l.*" (this, as I read the slip, being the fact). "The broker, it is true, has opened his slip for 27,500*l.* on freight, which is 13,750*l.* too much, but it is his business. He knows certainly as much and probably more about it than I do, and no harm is done, so far. He will find out his mistake presently and either ask to have the amount reduced, which, of course, I shall agree to do, or will have to make his client his own underwriter for the excess of 13,750*l.* and so keep on the safe side."

My Lords, I do not know what course an underwriter would feel bound to take if he said all this to himself, nor does it matter, for in fact I am sure this never would occur to him, but at any rate there would be no waiver, for I do not think a man can be a party to a breach, which is not yet and quite possibly never may become a breach at all, at the time when his action begins and ends. Whether or not it would be inequitable for Mr. Dumas to be allowed

(1) (1867) L. R. 2 H. L. 43, 57. (2) (1877) 3 App. Cas. 115, 132.

to enforce the condition under these circumstances I am sure I do not know. Counsel cited no authority to show that equity has ever restrained an underwriter from relying on a condition in such a case, but, if it would do so, it must be on some ground, and the statute specifies that ground and the only ground—namely, waiver. For my part I can see none.

Now as to the two policies produced. Both are signed by Lloyd's Underwriters' Signing Bureau, though in the case of the war risks policy one underwriter signs for himself, the subscription being 1000*l.* only, after the signing by the bureau is complete and in the case of the marine risks policy there are three such personal subscriptions, all subsequent to the work of the bureau. In the war risks policy the subscriptions by the bureau follow the order of the initials on the slip ; in the other case they do not, and for some reason the subscription of Mr. Dumas is last but two, the three last being those of the groups of names who sign per E. R. Pulbrook, Mr. Dumas being a member of the first of the three. It is to be noted that there are other policies, presumably similar, neither policy produced exhausting the respective total amounts insured. It would appear from the documents themselves that the official in the bureau had before him a battery of stamps, each with the list of the " names " and of the proportions that they take in printed characters and the signature of the writing member in facsimile, and, having checked the policy with the slip, stamped the subscriptions with the stamps selected from his battery, sometimes following the order in the slip and sometimes for reasons unknown adopting another order. Of Lloyd's Underwriters Signing Bureau we only know what is to be found in the note to § 102 of the 1921 edition of Arnould's Marine Insurance.

Each subscription is a separate insurance, and there is no joint contract by all the underwriters. I am afraid the appellants' argument somewhat overlooked this. The practice is to take many subscriptions, often all, on one slip and, in the case of Lloyd's underwriters, one policy. Even if

H. L. (E.) 1924 P. SAMUEL & CO. v. DUMAS. Lord Sumner.

the total insurance effected on freight f.i.a. eventually was excessive, joining many subscriptions in one policy cannot by itself make any individual underwriter a party to an excessive insurance. It is, therefore, in the addition of the figures 27,500*l.* to the words "freight f.i.a." that the whole burden rests. Now this does not make it a part of the assured's contract with the individual underwriters, that insurance, to the extent of 27,500*l.*, shall be effected. The contract does not make the underwriter join in or make him a party to a collective insurance. The underwriter takes a part of that total, but whether the assured actually insures that total or not the result is the same; for any sum which he does not insure, he will be his own underwriter. That is not enough. It surely cannot be said that, if 13,750*l.* only was effected with underwriters and the assured was his own underwriter for the balance, there could be an "amount insured for account of the assured," within the meaning of cl. 22, in excess of 13,750*l.* The figure put in to the slip becomes the basis of a calculation. It may be expected and intended to be carried through. That is a question of fact not proved in this case, but what of that? A man does not disentitle himself to rely on a condition when, knowing that the other party intends to do something which will be a breach, he simply stands by and leaves him to take his course: *Doe* v. *Allen*. (1) As to the policy, I suppose it is plain that the signing clerk at the bureau has no authority from Mr. Dumas to do anything but to see that the policy correctly carries out the slip and then to sign for him by using the stamp provided. He has no authority to waive anything, or to receive notice of any other subscription so as to bind Mr. Dumas thereby, or to do anything except to execute the policy. If so, it seems to me to follow that, in the case of the war-risks policy, the subscription of the policy carries the case no further than the slip did, for it does not affect Mr. Dumas with notice that the 13,750*l.* on freight f.i.a. has now been exceeded, and that such excess amount was contemplated appeared on the slip itself when

(1) (1810) 3 Taunt. 78.

opened. It is as though a separate policy in terms of the slip had been brought by the broker to Mr. Dumas and signed by him as a matter of course.

As to the marine risks policy the execution at the signing bureau involves nothing in the way of notice, knowledge or election, except that the policy is executed. For an underwriter to refuse to issue a signed policy in terms of his slip is a grave matter, all the graver because he is not legally compellable to do so. In business it means no more than giving the assured the means to enforce at law rights already acquired in substance on the initialling of the slip. In truth Mr. Dumas, or his underwriting agent, knew nothing more in October than was known on September 25, and the clerk in the signing bureau knew nothing at all, except that the two documents corresponded. I would draw attention to one further point. By the policies the risk begins at noon on September 25, and if the slip was initialled by Mr. Dumas at the end of the day on September 25 he was at risk forthwith, even though no other line was initialled afterwards, and thereupon he was entitled to his premium. Apparently the permissible amount of cover on freight was not exceeded on September 25 at all. If my inference is right, as the ship was at risk for two days before there was any breach of condition completed, and, as signing the policy could not at any rate affect the underwriters' liability for loss, if any, during that period and the right to the premium also, signing the policy cannot in itself show an intention to affirm that the insurance is valid at all events, no matter what has happened to the condition, but only that, for whatever Mr. Dumas may be liable on the slip, he is content to be legally bound and no more.

I am therefore of opinion that no waiver is proved, that the condition has been broken, and that on this ground the appellants fail.

Viscount Cave. My Lords, my noble and learned friend, Lord Parmoor, informs me that he agrees on all points with the opinion which I have expressed to your Lordships. My

H. L. (E.) 1924 P. Samuel & Co. v. Dumas.

noble and learned friend Lord Haldane desires me to say that he concurs in the conclusion at which your Lordships have arrived that this appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 25, 1924.

Solicitors for the appellants: *W. & W. Stocken.*
Solicitors for the respondent: *William A. Crump & Son.*

[PRIVY COUNCIL.]

J. C.* 1924 Jan. 25.

WELDEN . . . . . Appellant;

AND

SMITH . . . . . Respondent.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

South Australia—Claim against Government—Damage to Wheat delivered under Wheat Harvest Acts—Duty of Government.

The Wheat Harvests Acts, 1915–1917, of South Australia provided that an owner of wheat in that State might deliver his wheat to the Government for sale on his behalf, the price to be paid to him being made dependent upon the aggregate price received for all wheat of each year so delivered by growers and sold. The appellant delivered to the Government his wheat grown in the season 1916–17, and signed an agreement, agreeing that in consideration of the Government receiving and marketing the wheat on his behalf, he would accept the conditions and actions of the Government unreservedly in relation thereto.

In proceedings by the appellant against the Government under Act 6. of 1853 (South Australia), he alleged that the Government, by its servants and agents, had so negligently stored the wheat delivered that it had been damaged, whereby the aggregate price realized had been greatly reduced; he claimed an inquiry as to damages:—

Held, that the Government was bound to use reasonable care in the storage of the wheat: *Brabant & Co.* v. *King* [1895] A. C. 632 followed; and, it being conceded that having regard to *Farnell* v. *Bowman* (1887) 12 App. Cas. 643 a claim founded on tort could

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* *Present:* Viscount Cave L.C., Viscount Haldane, Lord Sumner, Lord Wrenbury, and Lord Darling.

properly be made under Act 6 of 1853 (South Australia), that the appellants would be entitled to recover damages upon proof of the negligence alleged.

Judgment of the High Court reversed.

APPEAL (No. 83 of 1923) by special leave from a judgment (1) of the High Court of Australia (February 12, 1923) reversing a judgment of the Full Court of the Supreme Court of South Australia (February 22, 1922).

The appeal arose out of a claim by the appellant against the Government of South Australia made under Act 6 of 1853 (South Australia), the respondent being the defendant nominated by the Government under that Act.

The appellant's claim was made on behalf of himself and of all other persons who had delivered to the Government under the provisions of the Wheat Harvests Acts, 1915–1917, of South Australia wheat grown in the season 1916–1917. The appellant by his petition under Act 6 of 1853 alleged that the Government, by its servants and agents, had so negligently kept the wheat delivered that it had been damaged by mice and exposure, whereby the total price realized, upon which depended the amount payable to himself and the other persons, had been seriously reduced. An inquiry as to damages was claimed.

The respondent by his defence pleaded (inter alia) (1.) that it was not competent to the appellant to petition on behalf of other persons, and (2.) that the petition showed no cause of action, nor any obligation by the Government to the petitioner.

The two questions of law thus raised were referred for trial to the Full Court of the Supreme Court of South Australia, which allowed the first objection, but held that the second should be overruled. On appeal to the High Court of Australia it was unanimously held that the petition showed no cause of action. The appeal is reported at 30 Commonwealth L. R. 585.

The material provisions of the Wheat Harvests Acts, 1915–1917, and the material facts appear from the judgment of the Judicial Committee.

(1) 30 Commonwealth L. R. 585.

J. C. 1924 WELDEN v. SMITH.

1923. Nov. 26, 27. *Maugham K.C.* and *Stamp* for the appellant. Damages for tort can be recovered in proceedings under Act 6 of 1853 (South Australia) : *Farnell* v. *Bowman*. (1) The relation between the appellant and the Government was contractual ; it was not that of seller and buyer, but that of principal and factor. The Government was bound to take reasonable care of the wheat delivered : *Brabant & Co.* v. *King* (2) The Act of 1915 provided for the cost of "marketing" being deducted by the Government from the proceeds of the wheat, and the Government is responsible for the negligence of the agents whom they employed to store the wheat. *Fowles* v. *Eastern and Australian Steamship Co.* (3) is distinguishable, having regard to the statutory provisions relevant to that case. Upon the appellant's wheat being mixed with the other wheat delivered for the purpose of the Acts, the appellant and the other growers acquired a proprietary interest in the aggregate. The question as to the appellant's right under Act 6 of 1853 to proceed on behalf of other growers is of no practical importance ; the Government, no doubt, will give general effect to the decision of the Board.

Barrington-Ward K.C., *Cleland K.C.* and *Doughty* for the respondents. Having regard to *Farnell* v. *Bowman* (1) it is not contended that a claim for damages for tort cannot be maintained under Act 6 of 1853. The present claim, however, shows no cause of action. The Wheat Harvests Acts involve political rather than trading operations. There was no contractual duty upon the Government except to appoint proper agents to carry out the transactions contemplated by the Act, as in *Fowles* v. *Eastern and Australian Steamship Co.* (3) The only duty upon the Government was such as is expressly provided by the Acts, or which arises therefrom by necessary implication : *Sharpness New Docks, &c., Co.* v. *Attorney-General* (4); *Attorney-General* v. *Great Northern Ry. Co.* (5) [Reference was made also to *Australian Workers'*

(1) (1887) 12 App. Cas. 643.
(2) [1895] A. C. 632.
(3) [1916] 2 A. C. 556.
(4) [1915] A. C. 654.
(5) [1916] 2 A. C. 356.

Union v. *Adelaide Milling Co.* (1); *Salaman* v. *Secretary of State for India* (2); and *Rosin and Turpentine Import Co.* v. *B. Jacob & Sons.* (3)]

Maugham K.C. in reply. In the *Sharpness Case* (4) the question was whether there was a duty, not whether the duty had to be performed with reasonable care.

1924. Jan. 22. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This appeal from the High Court of Australia raises, as a point of law, the question whether the Government of South Australia can be made liable for loss caused by the negligence of its servants and agents in the execution of the duties of the Government under the Wheat Harvest Acts (1915–17) of South Australia.

By s. 4 of the Wheat Harvest (1915–16) Act, 1915, it was provided that every owner of wheat who desired to do so might deliver his wheat to the Government for sale on his behalf, and should sign an agreement in the form set out in the schedule. By s. 5 of the same Act it was provided that all wheat delivered to the Government for sale by the Government on account of the owners might be sold at such time and place as the Minister of Agriculture might decide and at the best price obtainable at the time, and that the price to be received by the owners of wheat delivered to the Government for sale should be ascertained by a method which was described in the following terms: "From the aggregate of the returns for wheat sold by the Government plus the total dockages shall be deducted all expenses and expenditure incurred in or about the marketing of the wheat and certified by the Minister as being approved by him. The amount arrived at after making such deductions shall be divided by the number of bushels of wheat received for sale. The result will show the F.O.B. price of F.A.Q. wheat, and settlements will be made on that basis. The decision of the Minister as to the amount to be so deducted

(1) (1919) 26 C. L. R. 460, 467.
(2) [1906] 1 K. B. 613, 640.
(3) (1910) 102 L. T. 81.
(4) [1915] A. C. 654.

J. C. 1924 WELDEN v. SMITH.

for expenses and expenditure shall be final and bind all parties."

Shortly stated, the effect of this formula was that the net proceeds of all wheat sold by the Government under the Act were to be divided among the wheat owners concerned in proportion to the amount of wheat delivered by them respectively for sale; but, in order that an owner contributing wheat of fair average quality should not suffer by having his wheat pooled with inferior wheat, a "dockage" or deduction was to be made in respect of any inferior wheat. No express provision for fixing this dockage was contained in the Act; but apparently it was fixed by the Government agents on principles which were well understood and, after being added for the purpose of computation to the proceeds so as to permit of the price realized for wheat of fair average quality being ascertained, it was deducted from the share of the owner of the inferior wheat. The result of the proceeding was that, subject to this provision for the protection of the contributors of good wheat, each owner received for his wheat a price contingent on the aggregate price obtained for the whole.

The schedule to the Act contained a form of agreement as follows: "In consideration of the Government of South Australia undertaking to receive and market on my behalf wheat delivered by me, I hereby agree to abide by and accept the conditions and actions of the said Government unreservedly so far as the said wheat is concerned, and hereby authorise the said Government to handle and sell the said wheat in conjunction with other wheat in such manner as the said Government may consider to be to the best advantage, with periodical settlements as circumstances may permit, and agree to accept final settlement at such time as the said Government is able to close accounts. The Government of South Australia may proclaim a date not earlier than fourteen days from the date of proclamation from which accrual of interest on this certificate shall cease." The "final settlement" here referred to was obviously to be made in accordance with the

provisions of s. 5 of the Act, which was thus incorporated in the agreement.

The Act empowered the Minister to appoint companies, firms or individuals to act as agents for and on behalf of the Government in receiving, stacking, storing, protecting and delivering the wheat.

By the Wheat Harvest (1915–16) Amendment Act, 1916, the Act of 1915 was extended to the harvest of 1916–17; and it was provided that all contracts entered into with the Government by any owner of wheat should be deemed to provide that the Government, in handling and selling wheat to the best advantage, might handle and sell 1915–16 wheat in conjunction with 1916–17 wheat, and that for the purpose of ascertaining the price to be received by the wheat owners, the returns for both harvests should be aggregated as therein mentioned.

The appellant, an owner of wheat, delivered to the Government of South Australia his harvest for 1916–17, and signed an agreement in the form scheduled to the Act of 1915. The appellant has received, on account of the price payable to him for his wheat, a sum of 2*s.* 6*d.* per bushel, but the balance payable to him has not yet been settled.

On April 29, 1921, the appellant, under Act No. 6 of 1853 (which regulates pecuniary claims against the Government of South Australia), presented to the Governor of South Australia a petition whereby, after alleging that pursuant to the Wheat Harvest Acts, 1915 and 1916, a large number of owners of 1916–17 wheat had delivered their wheat to the Government of South Australia for sale on their behalf and had signed agreements in the scheduled form, and that the petitioner was one of such owners, he alleged as follows: "5. The said Government in the years 1916, 1917 and 1918 by its agents and servants kept large quantities of the wheat delivered to it, as stated in paragraph 1 hereof, negligently and without reasonable or proper care or protection, and carelessly and negligently omitted to keep or protect large quantities of the said wheat. 6. By reason of the negligence and

J. C. 1924 WELDEN v. SMITH.

carelessness of the said Government, its servants and agents, large quantities of the said wheat were damaged by mice and by exposure to the weather, and large quantities thereof were destroyed by mice and by exposure to the weather, and by reason thereof the said Government has not marketed or sold and cannot market or sell a large portion of the said wheat delivered to it, and has marketed and sold large quantities of the said wheat delivered to it at prices far below the prices which would or could and should have been received therefor if the same had not been damaged through the negligence and carelessness of the Government and its servants and agents." And the petitioner, on behalf of himself and all other persons who (being owners who delivered 1916–17 wheat to the Government, or executors, administrators or assigns of such owners) were entitled to receive the price prescribed by the said Acts of 1916–17 wheat delivered to the Government for sale, claimed a declaration that he and the said other persons were entitled to compensation for the negligence, carelessness, damage and loss above mentioned, and claimed to have such compensation ascertained by proper accounts and inquiries.

Pursuant to the provisions of the Act, the respondent was appointed a nominal defendant in the proceedings; and by an order dated June 21, 1921, it was ordered that the petition be treated as a writ of summons in an action and as a statement of claim in such action, and that a defence be filed, and that in other respects the Supreme Court Act, 1878, and the rules thereunder be applicable to the proceedings. The nominal defendant, on July 27, 1921, delivered a defence which contained the following plea: "1. The nominal defendant will object in point of law that the petition of the plaintiff is bad and insufficient on the grounds following, that is to say: (1.) That the petition is not authorized by Act No. 6 of 1853, in that the same is in respect of, or includes, matters of dispute or difference which the Court hath no jurisdiction or authority to entertain or to determine. (2.) That the petition discloses no cause of action; nor any sufficient or lawful obligation nor any

obligation on the part of the Crown towards the petitioner; nor any legal or equitable right of the petitioner against the Crown cognisable by the Court or enforceable therein." By an order dated August 2, 1921, it was ordered that the points of law raised by the nominal defendant in the above paragraph of his defence, be set down for hearing, and disposed of before the trial of the action.

On the hearing of the above points of law by the Full Court of the Supreme Court of South Australia, that Court upheld the first objection of the nominal defendant on the ground that a petition on behalf of a plaintiff and other persons was not contemplated by Act No. 6 of 1853; but the Court held that this objection was not fatal to the petitioner's case and that the petition was good in so far as it prayed for relief on behalf of the petitioner himself. Having regard to the course taken by the case on the appeal to the High Court of Australia, the latter Court did not find it necessary to deal with this point; and on the appeal before their Lordships it was not argued that the decision was incorrect in this respect. Upon this point, therefore, the decision of the Supreme Court of South Australia stands, and it need not be again mentioned.

Upon the second point of law raised by the nominal defendant, the Supreme Court decided against him and overruled his objection; but on appeal to the High Court of Australia that Court reversed the decision of the Supreme Court, mainly on the ground (stated by Knox C.J. and Gavan-Duffy and Starke JJ.) that, if the agreement in the scheduled form gave to each owner of wheat the right to insist that his own wheat should be carefully kept until it was sold, no similar right with regard to all other wheat was expressed or implied either in the agreement or in the statute. Higgins J. expressed the opinion that, having regard to the exceptional character of the statute, designed to meet the exceptional circumstances of the war, it was not to be inferred that the Government took any responsibility for the safe keeping of any of the wheat and added that he was strongly inclined to the opinion that under the Acts of 1915 and 1916

J. C. 1924 WELDEN v. SMITH.

the only holders of the wheat were to be agents appointed by the Government, and not the Government itself, but in this reasoning the other judges did not concur. The High Court declared that the petition of the present appellant disclosed no cause of action, and it is against this decision that the present appeal is brought.

Before forming a conclusion as to the obligations of the Government of South Australia in respect of the storage of wheat, it is desirable to consider what was the relation of that Government to the wheat owners. Was the Government only exercising administrative powers conferred upon it by statute, or was there a contractual relation between the Government and the owners? In their Lordships' opinion the latter is the true view. Under s. 4 of the Act of 1915, any owner of wheat who desired to deliver his wheat to the Government for sale on his behalf was to sign an agreement in the scheduled form, and that agreement recited and embodied an undertaking by the Government to receive and market the wheat on the owner's behalf. By the terms of the agreement the Government was authorized to handle and sell the wheat in conjunction with other wheat in such manner as it might consider to be to the best advantage; and provision was made for periodical settlements, which were obviously to be settlements in respect of the prices to be ascertained in accordance with s. 5 of the Act. There was, then, an agreement by the Government with each owner to receive, handle, and market that owner's wheat on his behalf and to pay him for such wheat the price prescribed by the statute, which was to depend upon the aggregate price obtained for all the wheat handled and sold. As in handling and marketing the wheat some storage was necessarily involved, the Government was authorized to appoint agents for receiving, stacking, storing and protecting the wheat; but it was not compelled to take that course, and any agents so appointed would be the agents of the Government.

Now, was the Government in the performance of its duties under this agreement, free from any obligation to take

ordinary and reasonable care? In their Lordships' opinion, it was not. It is true that neither the agreement nor the statute expressly mentions such an obligation, nor was it to be expected that any such express mention should be made. A person who undertakes to perform an act as the mandatary of another, whether as bailee, agent or otherwise, and whether for reward or gratuitously, is bound, without express words, to act in a reasonable and prudent manner having regard to the circumstances of the case. It matters not whether his obligation is regarded as a common law obligation the breach of which gives rise to an action of tort, or as an implied condition of his contract; in either case, the obligation arises without express words unless it is excluded by the terms of the contract. And if this is the case in an ordinary contract of bailment or agency, their Lordships see no reason why the same rule should not extend to the present case. The Government, having undertaken to receive, handle, and market the wheat of all the owners concerned and to pay them a price dependent on the due handling and sale of all the wheat received, must be regarded as the mandatary of all the owners and bound by the ordinary obligation of reasonable care; and their Lordships see no reason why this obligation should not extend to the handling and marketing (including the storage) of all the wheat dealt with by the Government, so as to be enforceable by each owner interested in the total sales. Each owner who delivered his wheat to the Government for sale and signed the agreement thereby acquired an interest in all the wheat which was to be sold with his, and became entitled to have that wheat handled with reasonable care and prudence.

It was suggested that, as the powers of the Government were imposed upon it by statute, the above considerations do not apply; but, in their Lordships' view, that circumstance cannot be held to relieve the Government from all obligation of using ordinary care. "It is an implied condition," said Lord Watson in *Gibraltar* (*Sanitary Commissioners*) v. *Orfila* (1), "of statutory powers that, when exercised at all,

(1) (1890) 15 App. Cas. 400, 411.

J. C. 1924 WELDEN v. SMITH.

they shall be executed with due care " ; and the same doctrine applies generally to cases where a public authority undertakes to deal with the property of the subject: see *Brabant & Co.* v. *King*. (1) The cases in which it has been held that statutory duties will not readily be extended by implication (such as *Sharpness New Docks, &c., Co.* v. *Attorney-General* (2), have no application to a case where the duty plainly exists and the only question is as to its careful exercise. It was not disputed that, having regard to the decision in *Farnell* v. *Bowman* (3), a claim founded on tort as well as a claim for breach of contract could properly be brought against the Government under Act No. 6 of 1853.

It was argued that, in view of the state of war existing at the time when the Acts were passed, of the lack of storage room in Australia at that time, and of the difficulty of obtaining tonnage for the export of wheat, it would be unreasonable to hold the Government of South Australia liable for insufficient or improper storage ; but in their Lordships' opinion this argument rests on a misunderstanding of the case alleged by the plaintiff. It is not sought to make the Government of South Australia responsible for not storing and protecting the wheat, but for negligence and want of proper care in respect of such storage and protection ; and if at the trial of the action it should appear that, owing to the circumstances, it was impossible for the Government, its agents and servants, acting reasonably, to provide the necessary storage, the action would fail. All such defences will, of course, be open to the respondent.

It was further argued that any implication of a duty to exercise reasonable care is excluded in the present case by the provision in the scheduled agreement whereby the owner agrees to " abide by and accept the conditions and actions of the Government unreservedly so far as the said wheat is concerned " ; but these words, which refer to conditions and actions in marketing the owner's wheat, are not apt to exempt the Government from responsibility for negligence in storing

(1) [1895] A. C. 632. (2) [1915] A. C. 654.
(3) 12 App. Cas. 643.

the aggregate wheat received. Words of indemnity, to be effective, must be clear; and the words quoted, properly construed, are words of authority and not of exoneration.

As to the suggestion of Higgins J., that the responsibility, if any, for careful storage is upon the agents of the Government, and not upon the Government itself, their Lordships are unable to accept it. The Government had power to appoint agents; but its powers were not confined (as in *Fowles* v. *Eastern and Australian Steamship Co.* (1)) to the selection of such agents. The agents, when appointed, acted on behalf of the Government; and there is no reason why the Government should not, according to the ordinary rule, be liable for their default.

For these reasons their Lordships are unable to agree with the view taken by the High Court of Australia that, upon the assumption (which for the present purpose must be made) that the Government of South Australia, its servants or agents, have been guilty of negligence or want of reasonable care in connection with the handling and selling of the owners' wheat, the owners are wholly without a remedy. They are of opinion that in point of law the Government may be made liable for negligence and want of reasonable and proper care, if proved; and they will humbly advise His Majesty that the order of the High Court of Australia be reversed and the order of the Full Court of South Australia restored, with costs here and below.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondent: *Sutton, Ommaney & Oliver.*

(1) [1916] 2 A. C. 556.

[PRIVY COUNCIL.]

J. C.* 1924 Jan. 25.

VERGE . . . . . APPELLANT;

AND

SOMERVILLE AND OTHERS . . . . . RESPONDENTS.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Charitable Trust—Bequest for "benefit of New South Wales returned soldiers"—Commonwealth statutory Repatriation Fund.

A resident in New South Wales bequeathed his residuary estate "unto the trustees for the time being of the 'Repatriation Fund' or other similar fund for the benefit of New South Wales returned soldiers." At the date of the will, and of the testator's death, there was established under statutes of the Commonwealth of Australia a repatriation fund for Australian soldiers generally, but there was no repatriation fund, or similar fund, for New South Wales soldiers:—

Held, that the gift created a valid charitable trust.

A valid charitable trust may exist although in its administration the benefit is not confined by the donor to the poor to the exclusion of the rich.

Goodman v. *Mayor of Saltash* (1882) 7 App. Cas. 633 followed; and dictum of Lindley L.J. in *In re Macduff* [1896] 2 Ch. 451, 464 approved.

In re Gassiot (1901) 70 L. J. (Ch.) 242 and *In re Elliott* (1910) 102 L. T. 528 commented upon.

Held, further, that the trustees of the Commonwealth statutory repatriation fund were not trustees of the charity, and that the settlement of a scheme had been rightly directed.

Judgment of the Supreme Court affirmed.

APPEAL AND CROSS-APPEAL (both by special leave) from a judgment of the Supreme Court of New South Wales in its equitable jurisdiction dated June 24, 1921.

The appeal and cross-appeal arose out of an originating summons taken out by first respondent as surviving executor of the will of German Verge, a grazier of New South Wales, who died on January 17, 1920. The defendants, the present respondents, were Sydney Verge, representing the next of kin, the Attorney-General for the Commonwealth of Australia, and the Attorney-General for the State of New South Wales.

* *Present:* LORD ATKINSON, LORD WRENBURY, and LORD DARLING.

The questions arising for decision were: (1.) Whether a bequest by the testator of his residuary estate "unto the trustees for the time being of the 'Repatriation Fund' or similar fund for the benefit of New South Wales returned soldiers," was a valid charitable trust, and (2.), if it was so, how it should be administered.

The circumstances relevant to the case are stated in the judgment of the Judicial Committee.

The Judge in Equity (Street J.) held that the gift was a valid charitable trust. Upon the further question he was of opinion that the testator did not intend to refer to the trustees of the repatriation fund established under statutes of the Commonwealth; and there being no fund in existence for the benefit of returned New South Wales soldiers, he ordered a reference to chambers to settle a scheme, including the appointment of trustees. The judgment is reported at [1921] S. R. (N. S. W.) 450.

There were cross-appeals by the above named appellant, representing the next of kin of the testator, and by the Attorney-General for Australia.

1923. Dec. 20. *Clauson K.C.* and *Alfred Adams* for the next of kin. The gift is not a valid charitable trust and is void. Under the words of the will pecuniary gifts could be made to a New South Wales returned soldier, apart from any religious or educational purpose, although he was not in indigent circumstances. There is no instance of a gift of that character being held to be a valid charitable trust. Street J. held that the gift was valid as being within the fourth category of valid charitable trusts mentioned in the judgment of Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* (1), namely as being for purposes "beneficial to the community," not coming within the heads previously mentioned. The learned judge relied on the language of Fitzgibbon L.J. in *In re Cranston* (2) as furnishing a test whether the gift was "beneficial to the community." Though that test was

(1) [1891] A. C. 531, 583. (2) [1898] 1 I. R. 431.

J. C. 1924 VERGE v. SOMERVILLE.

adopted in *In re Wedgwood* (1) it is too wide if it is to be read as including the present case. No doubt the community to be benefited may consist of a particular class of the public, and under the decision in *Goodman* v. *Mayor of Saltash* (2) and *In re Christchurch Inclosure Act* (3) the class may, in exceptional cases, be a small one. The benefit however must be to each and every member of the class; here the benefit is to individual members to be selected out of a class, without regard to their indigence, or to religious or educational purposes. [Reference was also made to *Morice* v. *Bishop of Durham* (4); *In re Macduff* (5); *Blair* v. *Duncan* (6); *Grimond* v. *Grimond* (7); *In re Sidney* (8); *In re Davis* (9); *In re Tetley* (10); *In re Clarke* (11); *In re Gassiot* (12); *In re Elliott* (13); and (generally) to cases held to be within the fourth rule in *Pemsel's Case* (14) collected in Tudor on Charities (4th ed., 1906), pp. 55 to 61, and Tyssen's Charitable Bequests (2nd ed., pp. 103 to 118).]

Maugham K.C. and *Wilfred Barton* for the Attorney-General for Australia. The gift was a valid gift to an existing and well-known fund, namely the repatriation fund, established since 1916 under statutes of the Commonwealth. The words "for the benefit of New South Wales returned soldiers" are not words of description of the fund, but words of destination. The Acts and the regulations made thereunder show that the intended recipients of the benefits were poor persons. The repatriation of soldiers is a public purpose. The residue should be paid to the trustees of the statutory repatriation fund.

[Their Lordships, in the course of the above argument, said that they were satisfied that the gift was a valid charitable trust.]

(1) [1915] 1 Ch. 113.
(2) 7 App. Cas. 633.
(3) (1888) 38 Ch. D. 520, 530.
(4) (1804) 9 Ves. 399; 10 Ves. 522.
(5) [1896] 2 Ch. 437, 464.
(6) [1902] A. C. 37.
(7) [1905] A. C. 124.
(8) [1908] 1 Ch. 488.
(9) [1923] 1 Ch. 225.
(10) [1923] 1 Ch. 258.
(11) [1923] 2 Ch. 407.
(12) 70 L. J. (Ch.) 242.
(13) 102 L. T. 528.
(14) [1891] A. C. 531, 583.

Luxmoore K.C. and *Hon. Geoffrey Lawrence* for the Attorney-General for New South Wales, supported the order directing a scheme.

1924. Jan. 25. The judgment of their Lordships was delivered by

LORD WRENBURY. On January 17, 1920, German Verge, of New South Wales, grazier, died, having by his will, dated October 1, 1919, bequeathed his residuary estate "unto the trustees for the time being of the 'Repatriation Fund' or other similar fund for the benefit of New South Wales returned soldiers." The questions for decision are whether this is a valid charitable trust, and if it is, how it ought to be administered. The appellant (for the next of kin) contends that the gift is void—that it is not a valid charitable trust. The cross-appellant, the Attorney-General for the Commonwealth of Australia, contends that it is a valid trust, and that it ought to be administered by the trustees of a certain statutory repatriation fund for Australian soldiers. The respondent, the Attorney-General for the State of New South Wales, contends also that it is valid, but says that the judge in Equity was right in ordering, as he did, that a scheme should be settled.

Before dealing with and deciding the proper construction of the words of gift, their Lordships find it convenient to discuss some propositions of law in view of which the case falls to be decided.

To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot. If this test is satisfied, is it necessary to find, further, that the class is confined to poor persons, to the exclusion of persons not poor? Is poverty a necessary

J. C. 1924 VERGE v. SOMERVILLE.

element? In argument it was scarcely pressed that it is necessary, and after the decision in *Goodman* v. *Mayor of Saltash* (1) it was not possible to maintain the general proposition that it is. A trust or condition in favour of the free inhabitants of ancient tenements in the borough of Saltash, in accordance with a usage whereunder they had the privilege of dredging for oysters, was there held to be a valid charitable trust, and, obviously, some of the inhabitants might not have been poor. The poor are not the only people who like oysters or the profits to be derived from their sale. In the course of the judgments reference was, in fact, made to the character of the "free inhabitants" in terms which show that the noble and learned Lords were, in fact, not regarding them as poor. Thus, Lord Cairns says (2) that he must conclude that they were persons who originally had some share in the corporation of the borough of Saltash and were in some way connected with the corporation; and Lord Fitzgerald states (3) the same matter more at large, and indicates that they were probably the burgesses and were persons who contributed to the public charges and took their part in bearing the public duties.

In the course of the judgments in that case, Lord Selborne (4) says: "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust; and no charitable trust can be void on the ground of perpetuity."

Lord Cairns says (5): "A trust of that kind" (i.e., a trust for the free inhabitants of ancient tenements in the borough) "would not in any way infringe the law or rule against perpetuities, because we know very well that where we have a trust which, if it were for the benefit of private individuals, or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable trust, that is to say, a public interest, it will be

(1) 7 App. Cas. 633.
(2) Ibid. 650.
(3) 7 App. Cas. 668.
(4) Ibid. 642.
(5) Ibid. 650.

free from any obnoxiousness to the rule with regard to perpetuities."

Neither of the noble and learned Lords adds poverty as a relevant factor, and, obviously, a class of all the free inhabitants is not a class confined to its poorer members. In *In re Christchurch Inclosure Act* (1) Lindley L.J., referring to the *Saltash Case* (2), said: "Had it not been for the decision of the House of Lords in *Goodman* v. *Mayor of Saltash* (2), we should have felt great difficulty in holding this trust to be a charitable trust. For, although the occupiers of these cottages may have been, and perhaps were, poor people, the trust is not for the poor occupiers, but for all the then and future occupiers, whether poor or not."

The decision in *In re Christchurch Inclosure Act* (3) follows and illustrates the *Saltash Case* (2), the class being the occupiers of certain cottages which had theretofore enjoyed rights of turbary over tracts of commonable and waste lands of a manor.

Finding themselves in this difficulty, counsel for the appellant advanced an ingenious argument—namely, that in both these cases the person who claimed the benefit was entitled to it as matter of right, and that the case in which a member of the class is entitled to the benefit as matter of right, if he chooses to claim it, and the case in which he is eligible for the benefit but would only enjoy it if in the administration of the trust the trustees think proper to give it him are different, and that in the latter case poverty is a necessary element. The proposition is strange that a trust may be charitable if the rich are as matter of right objects of the trust, but cannot be charitable if they can share, if, and only if, the trustees administering the fund think proper to admit them to benefit, and their Lordships can find no principle on which this contention can be based. The difference, if any, would seem to be the other way. Counsel were unable to cite any authority for their proposition, and although if it were sound it would surely have received

(1) 38 Ch. D. 520, 530. (2) 7 App. Cas. 633.
(3) 38 Ch. D. 520.

J. C. 1924 VERGE v. SOMERVILLE.

attention before this, yet their Lordships are not prepared to dismiss it without examination, and therefore proceed to examine it.

In the investigation of the legal meaning of the word "charity" as distinguished from its popular meaning, the statute of Elizabeth (43 Eliz., ch. 4) must always be the starting-point. That statute has long been obsolete, and was finally repealed in 1888 by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict., ch. 42), subject to saving words not material for the present purpose. The words in the preamble are not a definition of charitable uses, but are a detailed statement of certain uses which are to be charitable, and in dealing with the matter, the course which the Court of Chancery has pursued has been to look at the enumeration of the charities in the statute, and to include under the word charitable any gift of funds for a public purpose which is analogous to those mentioned in the statute. In fact, the legal meaning and the popular meaning of the word "charitable" are so far apart that it is necessary almost to dismiss the popular meaning from the mind as misleading before setting out to determine whether a gift is charitable within the legal meaning. For instance, the statute includes gifts for the repair of bridges, ports, harbours, causeways . . . . and highways—objects obviously of benefit not to the poor only, but to the community as a whole, comprising rich as well as poor. From this point their Lordships may well pass on to Lord Macnaghten's famous judgment in *Income Tax Commissioners* v. *Pemsel* (1), where, taking his start evidently from Sir Samuel Romilly's argument in *Morice* v. *Bishop of Durham* (2), he says: "How far, then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

(1) [1891] A. C. 531, 583. (2) 10 Ves. 522, 531.

His fourth head does not contain the word "poor." He does not say "beneficial to the poorer members of the community"; he says, "beneficial to the community." Did he mean his words to be read as confined to the poor? Education and religion, two of the heads which he had just mentioned, do not require any qualification of poverty to be introduced to give them validity. If he was going by general words to add a fourth class in which poverty must be an ingredient, he would surely have said so. He goes on to say: "The trusts last referred to" (i.e., the fourth class) "are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor."

Upon the word "incidentally" might, perhaps, have been founded an argument that the trust is invalid as a charitable trust if it benefits the rich in any way other than indirectly—but for the fact that *Goodman* v. *Mayor of Saltash* (1) had nine years before upheld as charitable a trust under which rich as well as poor could, not incidentally but directly, claim to share the benefit. Their Lordships understand Lord Macnaghten's words as meaning "beneficial to the community," and not "beneficial to the poor members of the community."

A large number of cases were cited at the Bar—such, for instance, as *Blair* v. *Duncan* (2); *Grimond* v. *Grimond* (3); and *In re Sidney* (4), in which a gift not confined to charitable purposes but given to "charitable or public purposes," or a gift to "such charitable or religious institution and societies as my trustees may select," or a gift "for such charitable uses or for such emigration uses, or partly for such charitable uses and partly for such emigration uses, as my trustees shall select," were held not to create valid charitable trusts, because either they were not confined to charitable purposes or were so vague as to be void for uncertainty. The latest case of this kind is *Attorney-General* v. *National Provincial Bank*. (5) These lend no assistance to the present inquiry. There is,

(1) 7 App. Cas. 633.
(2) [1902] A. C. 37.
(3) [1905] A. C. 124.
(4) [1908] 1 Ch. 488.
(5) [1924] W. N. 15; affg. [1923] 1 Ch. 258.

J. C. 1924 VERGE v. SOMERVILLE.

however, one case of this kind: *In re Macduff* (1), in which Lindley L.J. does say something which is relevant but which is not in favour of the appellant; he says: "I am quite aware that a trust may be charitable though not confined to the poor; but I doubt very much whether a trust would be declared to be charitable which excluded the poor." With the case last supposed their Lordships are not here concerned. Upon a review of the authorities and after the decision in the *Saltash Case* (2) they agree with Lindley L.J. in the case first supposed. They are of opinion that a valid charitable trust may exist notwithstanding the fact that in its administration the benefit is not confined by the donor to the poor to the exclusion of the rich.

It is, perhaps, well to mention two cases cited for the appellant: *In re Gassiot* (3), decided by Cozens-Hardy J., and *In re Elliott* (4), decided by Parker J., in which are to be found expressions which the appellant sought to use as indicating poverty as a necessary qualification. Their Lordships content themselves with pointing out that in neither case was the *Saltash Case* (2) cited.

Their Lordships pass on to consider the nature of the gift and the words of gift in the present case. The words are: "unto the trustees for the time being of the 'Repatriation Fund' or other similar fund for the benefit of New South Wales returned soldiers." The facts are that when the testator made his will and when he died the following had been the history of a "Repatriation Fund," not for New South Wales returned soldiers in particular but for Australian soldiers generally. Statute No. 7 of 1916 of the Commonwealth of Australia intituled "The Australian Soldiers Repatriation Fund Act, 1916," established a statutory fund called "The Australian Soldiers' Repatriation Fund," and appointed trustees of the fund and defined their powers and duties. It provided for "State War Councils" for each State in the Commonwealth, gave the trustees power to allocate sums or property to each State War Council, and

(1) [1896] 2 Ch. 451, 464.
(2) 7 App. Cas. 633.
(3) 70 L. J. (Ch.) 242.
(4) 102 L. T. 528.

gave the Council power to apply those funds for the assistance and benefit of Australian soldiers and of their dependants. The Governor-General was empowered to make regulations prescribing the conditions under which a State War Council might expend sums allocated to it.

Under this Act regulations were made, including a reg. 11 (4.) (*a*), as follows: "(4.) The State War Council or the Committee thereof, as the case may be, shall regard as ineligible any applicant who—(*a*) is deemed by it to have adequate means or to be adequately provided for under any scheme promoted by any Governmental or private agency; . . . . but may, if it thinks fit, recommend the application of any such applicant for the favourable consideration of the trustees."

By the Act No. 37 of 1917, "The Australian Soldiers Repatriation Act, 1917," the Act of 1916 was repealed: a Repatriation Commission was appointed, and by s. 9 there was to be a State Repatriation Board for each State, and by s. 12 there might be Local Committees within a State, and they could raise and control funds for the district and disburse funds within the district. By s. 17 the control of local funds for the repatriation of Australian soldiers theretofore raised in a district were vested in the trustees of the fund, and by s. 16 all the trust properties were vested in the Commission.

A subsequent Act 15 of 1918 contains a long section, the substance of which is that motherless children and widows and dependants and persons incapacitated, and so on, are in particular the objects of assistance.

Under this Act of 1918 again, statutory regulations were made. They are very lengthy and detailed. On looking through them, their Lordships are satisfied that assistance which the soldier or his dependants require is that which it is intended to give, and the weekly allowances which are to apply to different circumstances, ranging as they do from 42*s.* to 86*s.* 6*d.* a week, show that the class to be benefited is not the rich.

This was the state of the legislation when the testator

J. C. 1924 VERGE v. SOMERVILLE.

died. There was not at his death any repatriation fund for the benefit of New South Wales soldiers, as distinguished from Australian soldiers.

After his death Act No. 6 of 1920 was passed. This repealed the previous Acts, and appointed a Repatriation Commission, and s. 13, sub-s. 1, appointed a Repatriation Board for each State.

There can be no question but that the gift in the testator's will satisfies the first test required to support it as a good charitable trust. It is a public trust and is to benefit a class of the community—namely, men from New South Wales who served in the war and were returned or to be returned to their native land. Further, if it were necessary to consider at all the question of a trust for the poor, it is a gift which is to benefit that class in some sense expressed by the word "repatriation." This does not mean simply restoring them to New South Wales by paying their fare home. They may be "returned" already, not "returning" soldiers. It means restoring them to their native land and there giving them a fresh start in life. Their Lordships have no doubt that this is a charitable purpose. If it were (which in their opinion it is not) necessary to find that need of assistance is to be a qualification for benefit—that the gift is charitable in the sense of assisting the needy—they find that the words "Repatriation Fund," in relation to the facts as to the Australian Repatriation Fund of which no doubt the testator had knowledge, indicate an intention to benefit the needy. If his words "Repatriation Fund or other similar fund" are referable at all to the statutory Australian Soldiers' Repatriation Fund, and if it were necessary to find a reference to poverty, their Lordships have no difficulty in finding it.

The testator's words may be read in more than one way. First, the words "for the benefit, etc.," may qualify both the words "Repatriation Fund" and the words "or other similar fund." If this be the meaning there is no gift to the trustees of the statutory Repatriation Fund, for there was no such fund for the benefit of New South Wales returned

soldiers. Secondly, the language may be read as if the words "Repatriation Fund" were separated from that which follows and as if the next words stood apart, with the result that the words "for the benefit," etc., qualify the "other similar fund" and nothing else. It remains, however, that the latter fund is to be one "similar" to the former, and the test of similarity must lie in benefit to New South Wales returned soldiers. The repatriation fund, therefore, must again be one for the benefit of New South Wales returned soldiers. Thirdly, the words may be read as a gift for the benefit of New South Wales returned soldiers, but made to the trustees of the Repatriation Fund (meaning the statutory "Australian Soldiers' Repatriation Fund") or other similar fund. If this were the meaning the Attorney-General for the Commonwealth would succeed. But the language, in their Lordships' opinion, does not bear this meaning. The words "Repatriation Fund" are in the will in inverted commas, and purport to state the name of the fund to which the testator refers. To bear this meaning they would look to find the correct name, "Australian Soldiers' Repatriation Fund," set out at length. It is not the phrase used.

From these considerations, in their Lordships' opinion, two results follow: first, as between the Commonwealth of Australia and the State of New South Wales the administration of the fund does not rest with the former; and secondly, inasmuch as there is no repatriation fund for New South Wales returned soldiers, there are no named trustees who are to govern the administration and no detailed directions given as to administration, with the result that it is necessary to settle a scheme.

It results that there was created here a valid charitable trust; that under the circumstances above stated the trustees of the statutory fund known as the "Australian Soldiers' Repatriation Fund" are not the trustees of the charity; that, for want of a trustee named with certainty and for want of clear directions as to the administration of the fund, it is necessary to settle a scheme. This was the opinion of the learned judge in Equity. Their Lordships agree with

J. C. 1924 VERGE v. SOMERVILLE.

him. The appeal should be dismissed with costs, and the cross-appeal will also stand dismissed, but without costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for next of kin: *Bell, Brodrick & Gray.*

Solicitors for Attorney-General for Australia: *Coward & Hawksley, Sons & Chance.*

Solicitors for Attorney-General for New South Wales: *Light & Fulton.*

[PRIVY COUNCIL.]

J. C.* 1924 *Feb.* 14.

ST. LUCIA USINES AND ESTATES COMPANY, LIMITED . . . . . } APPELLANTS;

AND

COLONIAL TREASURER OF ST. LUCIA RESPONDENT.

ON APPEAL FROM THE ROYAL COURT OF ST. LUCIA.

St. Lucia—Income Tax—"Income arising or accruing"—Debt accruing but unpaid—Ultra vires Assessment—"Final and conclusive"—Income Tax Ordinance, 1910 (*No.* 9 *of* 1910, *St. Lucia*), *s.* 4, *sub-s.* 1.

In 1920 the appellants sold all their property in St. Lucia and ceased to reside or carry on business there. In 1921 interest upon the unpaid part of the purchase price was payable to them, but it was not paid. The appellants were liable to pay income tax for the year 1921 under the Income Tax Ordinance, 1910, of St. Lucia, only if the interest above mentioned was "income arising and accruing" to them in 1921:—

Held, that though the interest was a debt accruing in 1921 it was not "income arising or accruing" in 1921, and that the appellants were not liable under the Ordinance to pay tax for that year.

Held, further, that the appellant not being liable to assessment at all for 1921, it was not material that by s. 25 of the Ordinance an assessment when entered in the list was to be "final and conclusive."

Judgment of the Royal Court reversed.

APPEAL (No. 79 of 1923) by special leave from a judgment of the Royal Court of St. Lucia (Appellate Jurisdiction), (November 17, 1922), reversing an order of the First District Court.

* *Present:* LORD ATKINSON, LORD WRENBURY, and LORD DARLING.

The respondent filed in the First District Court a certificate under s. 35 of the Income Tax Ordinance, 1910, of St. Lucia, certifying that 3140*l.* 13*s.*—namely, 2848*l.* 13*s.* for income tax and 292*l.* for fines in respect of the year 1921, were due and owing to the Crown by the appellants. He subsequently took out a summons under ss. 36 and 37 of the Ordinance requiring the appellants to show cause why they should not be ordered to pay the said sum.

The magistrate having refused to make any order, the present respondent appealed to the Royal Court of St. Lucia (Appellate Jurisdiction), which Court allowed the appeal, and remitted the case to the magistrate to be dealt with.

The facts of the case and the provisions of the Ordinance appear from the judgment of the Judicial Committee.

1924. Jan. 24, 25. *Hon. Geoffrey Lawrence* for the appellants.

Clauson K.C. and *Giveen* for the respondent.

[The arguments were substantially upon the provisions of the Ordinance. For the appellants reference was made to *Brown* v. *National Provident Institution* (1), and for the respondent to *Gleaner Co.* v. *Assessment Committee.* (2)]

1924. Feb. 14. The judgment of their Lordships was delivered by

LORD WRENBURY. The question is whether under the Income Tax Ordinance, 1910, of St. Lucia, the St. Lucia Usines Co. were in the year 1921 liable to be assessed for income tax in respect of the year ending on December 31, 1921.

The material facts are few. The company had for some years down to and including the year 1920 owned estates and carried on business in St. Lucia and duly paid income tax down to the end of the year 1920. In 1920 it sold all its estates in the island, and since the end of 1920 it has not resided and has not carried on any business there. Under the deed of sale of one of the properties a sum of 64,379*l.* 0*s.* 11*d.*, part of the purchase price of 117,879*l.* 0*s.* 11*d.*, was left

(1) [1921] 2 A. C. 222. (2) [1922] 2 A. C. 169, 173.

J. C. 1924

ST. LUCIA USINES AND ESTATES CO. v. ST. LUCIA (COLONIAL TREASURER).

unpaid and was secured by "vendor's privilege" and by a covenant on the part of the purchaser to pay on November 30, 1921, that sum with interest at 6 per cent. from November 19, 1920. The obligation of the purchaser under that covenant was not met. No interest was paid in 1921. The company obtained a judgment and the interest was subsequently paid. In this state of facts the judgment under appeal is one under which the company is held liable for 2848*l.* 13*s.* for income tax in respect of the year 1921 and 292*l.* 0*s.* 8*d.* for fines for default in payment.

In stating the machinery of the Income Tax Ordinance their Lordships will for clearness refer to the year 1921, but the same is, of course, true for any other year.

Income tax is an annual tax on income derived from any source (s. 3, sub-s. 1), and is due and payable in respect of the year in which it is assessed (s. 6). In February, 1921, a person liable to pay income tax in respect of the year 1921 had to make a return of his whole income for the year ended on September 30, 1920, in the form in the second schedule (s. 15). That form uses the words "my income from all sources during the year ended September 30, 1920." The Ordinance calls it "a return of his income" (s. 15, sub-ss. 1, 4). This return is the basis of an assessment to be made upon him for income tax for the year 1921. The income tax is due and payable on or before July 31, 1921, "in respect of the year ending on" December 31, 1921 (s. 6). The tax is imposed upon a person whom the Ordinance calls the "person liable to pay income tax" (s. 15, sub-s. 1; s. 20). It is imposed upon the person in respect of his income (see e.g., s. 4, sub-s. 1 (*a*) ad finem, s. 18, sub-ss. 1, 2, 4) and is a tax "in respect of the year ending on" December 31, 1921 (s. 6).

On or before June 1, 1921, the treasurer is to insert in the Gazette a notice to the effect that income tax for the year ending December 31, 1921, is due and payable on July 31, 1921 (s. 31). During August he is to receive all taxes remaining unpaid after July 31 (s. 32), and on or before August 15 he is to give notice in the Gazette that warrants

will be issued for recovery of taxes and fines remaining unpaid after August 31 (s. 33).

The outcome of all this is that a person liable to pay income tax in respect of the year 1921 has to return his income for the period September, 1919, to September, 1920; is under s. 6 liable to pay income tax in respect of the year 1921, and the measure of the income in respect of which he is liable is his whole income from September, 1919, to September, 1920.

The next step is to ascertain who is the person liable to pay income tax in respect of the year 1921. The answer is to be found in s. 3. Sect. 3 enacts that "every person receiving income or to whom income shall accrue shall in respect of such income pay an annual income tax" at certain defined rates. By s. 4, sub-s. 1: "The income in respect of which income tax is imposed shall include" (*a*) certain income arising or accruing to any person residing in the colony, (*b*) certain income arising or accruing to a person not residing in the colony but derived from profits of property in the colony or from profession or trade carried on in the colony, and (*c*) income arising or accruing to any person residing in the colony derived from a source in or out of the colony and income arising or accruing to a person not residing in the colony derived from a source in the colony, with a proviso that "in respect of income derived from sources out of the colony only so much of such income as is received in this colony shall be chargeable with income tax." The word "received" here is of some importance with reference to something which follows.

From the foregoing it results that the person liable to pay income tax (s. 15, sub-s. 1) must be either a person residing in the colony or a person not residing in the colony but having income derived from a source in the colony.

In the year 1921 the company was not resident in the colony. After 1920 it neither resided nor carried on trade in the colony. It remains to inquire whether in the year 1921 it had income derived from a source in the colony. If it had it was taxable "in respect of the year 1921," and the measure of its liability was the profit it made between

J. C. 1924

ST. LUCIA USINES AND ESTATES CO. v. ST. LUCIA (COLONIAL TREASURER).

September, 1919, and September, 1920, when it was trading in the colony. But if it had not it was not taxable in respect of the year 1921.

In the year 1921 the company derived no profit from a source in the colony unless the interest on the above-mentioned sum of 64,379*l.* 0*s.* 11*d.* was profit derived in that year or was income received or accrued in that year. The question to be answered is whether the company was a person who within s. 3, sub-s. 2, received income or to whom income accrued in that year in respect of this interest.

The words " arising or accruing " occur repeatedly in the Ordinance, e.g., in s. 4, sub-s. 1 (*a*) (*b*) (*c*) (*d*) and (*e*), coupled with the words " and derived from " or " or derived from." Sometimes the expression " derived from " is used alone, s. 5, sub-s. 1 (*a*) (*c*) (*g*) (*i*) and (*ii*). The respondent contends that the above interest " accrued " to the company in the year 1921, because it was payable in that year and none the less because it was not paid in that year. Their Lordships do not agree. The words " income arising or accruing " are not equivalent to the words " Debts arising or accruing." To give them that meaning is to ignore the word " income." The words mean " money arising or accruing by way of income." There must be a coming in to satisfy the word " income." This is a sense which is assisted or confirmed by the word " received " in the proviso at the end of s. 4, sub-s. 1. If the taxpayer be the holder of stock of a foreign Government carrying say 5 per cent. interest, and the Government is that of a defaulting State which does not pay the interest, the taxpayer has neither received nor has there accrued to him any income in respect of that stock. A debt has accrued to him but income has not. It does not follow that income is confined to that which the taxpayer actually receives. Where income tax is deducted at the source the taxpayer never receives the sum deducted but it accrues to him. It is said, and truly, that a commercial company, in preparing its balance sheet and profit and loss account, does not confine itself to its actual receipts—does not prepare a mere cash account—but values its book debts and its stock in

trade and so on and calculates its profits accordingly. From the practice of commerce and of accountants and from the necessity of the case this is so. But this is far from establishing that income arises or accrues from (as above instanced) an investment which fails to pay the interest due. Counsel for the respondent sought to found an argument upon s. 11 and the words "income chargeable with income tax" in s. 18. No income is chargeable with income tax under the Ordinance. It is a person that is chargeable in respect of his income. The words "income chargeable with income tax" mean "income in respect of which he is chargeable."

Being of the above opinion it follows that during the year 1921 no income arose or accrued to the company from any source within the colony. And the company was not during the year resident in the colony. It was therefore not assessable in respect of that year.

It is unnecessary to deal with the question which was considered below, but which has not been urged before this Board, as to the words "final and conclusive" in s. 25. Inasmuch as in their Lordships' judgment the company was in the year 1921 not assessable at all, it was not a person "required by the Ordinance to make and deliver a return," but was outside the Ordinance altogether, and action taken under the Ordinance cannot result in anything "final and conclusive" against the company.

In their Lordships' opinion this appeal succeeds. The order of the acting Chief Justice must be discharged with costs here and below and the matter remitted to the acting magistrate with a declaration that the company was not assessable in respect of the year 1921 and with a direction to him to deal with the summons in such manner as to give effect to that declaration. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Coward & Hawksley, Sons & Chance.*

Solicitors for respondent: *Burchells.*

[PRIVY COUNCIL.]

J. C.* 1924 Feb. 14.

BENAIM AND COMPANY . . . . . APPELLANTS;

AND

L. S. DEBONO . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL, MALTA.

Conflict of Laws—Sale of Goods—Delivery f.o.b.—Loss of right to reject—Lex solutionis—Privy Council Practice—New contention of Law—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 35—*Gibraltar Ordinance No.* 20 *of* 1895, *s.* 35.

By letters and telegrams between the appellants in Gibraltar and the respondent in Malta the appellants sold to the respondents anchovies f.o.b. Gibraltar. Upon the anchovies arriving in Malta the respondent complained of their quality, but without claiming to reject them; on the contrary he claimed an allowance for an alleged shortage and delivered them to purchasers from him. Upon their refusing to accept the goods, the respondent claimed to rescind his contract with the appellants, and brought an action against them in Malta. The Courts there found that the anchovies were defective in quality, and, applying the law of Malta, held that the respondent was entitled to rescind the contract, and to recover from the appellants the price, together with the sums paid for freight and insurance:—

Held, that the respondent's right to reject depended upon the law of Gibraltar, that being the place of performance of the contract; and that under Gibraltar Ordinance No. 20 of 1895, s. 35 (which is in the same terms as s. 35 of the Sale of Goods Act, 1893), the respondent had lost that right, since he had acted in a manner inconsistent with the ownership of the sellers.

Held, further, that the appeal should be allowed (but without costs), although the contention that the case was governed by the law of Gibraltar was raised for the first time upon the appeal to the Privy Council.

Judgment of the Court of Appeal, Malta, reversed.

APPEAL (No. 26 of 1923) from a judgment of the Court of Appeal, Malta (April 5, 1922), affirming a judgment of the Commercial Court (Malta).

The respondent, who carried on business in Malta, brought an action in the Commercial Court, Malta, against the appellants, who carried on business in Gibraltar, claiming rescission of a contract for the sale of anchovies f.o.b. Gibraltar, repayment of the price and other relief.

* *Present:* LORD ATKINSON, LORD WRENBURY, and LORD DARLING.

The facts appear by the judgment of the Judicial Committee.

The trial judge held that the respondent was entitled to rescind the contract and to recover the price paid, together with freight and insurance premiums. That judgment was affirmed by the Court of Appeal.

1924. Jan. 28. *Somervell* for the appellants. The contract being for delivery f.o.b. Gibraltar, the law applicable to the case was the law of Gibraltar, that being the place of performance : *Jacobs* v. *Crédit Lyonnais* (1) ; *Saunt* v. *Belcher & Gibbons* (2) ; Westlake's Private International Law, § 212, Dicey's Conflict of Laws, 3rd ed., p. 609. Although the contention that the Gibraltar law applied was not made in the lower Courts, it is available to the appellants : *Cooper* v. *Cooper*. (3) After delivery the respondent acted in a manner inconsistent with the appellants being owners. Consequently under Gibraltar Ordinance No. 20 of 1895, s. 35 (which is in the same terms as the Sale of Goods Act, 1893, s. 35), he cannot claim to reject. Further, the respondent had ample opportunity to inspect the goods at Gibraltar ; his claim to reject was not made within a reasonable time of delivery there. On the question of the quality of the anchovies the Courts in Malta misdirected themselves as to the effect of the contract.

Wright K.C. and *C. J. Colombos* for the respondent. The intention of the parties to be implied from the contract was that the legal remedies under it should be taken in Malta, and according to the law of that place. That intention governs the question of what law was applicable : *Cooper* v. *Earl Waldegrave* (4) ; *Hamlyn & Co.* v. *Talisker Distillery* (5) ; Dicey's Conflict of Laws, 3rd ed., p. 602. That intention is to be implied from the fact that the contract was made by the respondent in Malta accepting the appellants' offer, and the fact that the respondent had no control over the

(1) (1884) 12 Q. B. D. 589.
(2) (1920) 26 Com. Cas. 115.
(3) (1888) 13 App. Cas. 88.
(4) (1840) 2 Beav. 282.
(5) [1894] A. C. 202.

J. C. 1924 BENAIM & Co. v. L. S. DEBONO.

goods, or opportunity to inspect them until they arrived in Malta. Under the provisions of the law of Malta, Ordinance 7 of 1868, p. 1104, the respondent had the right to reject, the disconformity of the goods to the contract being discovered only after delivery to the respondent's customers. The law of Malta is substantially the Civil Code, and the respondent relies on *Wallace & Brown* v. *Robinson Fleming & Co.* (1), and also on Dalloz Jurisprudence Générale, 1878, p. 471. The appellants did not contend in the lower Courts that the law of Gibraltar applied—on the contrary, by their notice of appeal to the Court of Appeal, they relied upon the law of Malta. In these circumstances it would be contrary to the practice of the Board to allow the contention now to be put forward. In *Cooper* v. *Cooper* (2) the contention to which effect was given had been raised at an earlier stage of the litigation. But even if the law of Gibraltar applies, the respondent was, in the circumstances of the case, still entitled to reject.

Somervell in reply. Even if the purported rescission was within a reasonable time of delivery, the sub-sales preclude the right: *Hardy & Co.* v. *Hillerns and Fowler* (3).

Feb. 14. The judgment of their Lordships was delivered by

LORD DARLING. This is an appeal from a judgment dated April 5, 1922, of the Court of Appeal, Malta. By that judgment the Court upheld the judgment dated September 28, 1921, of the Commercial Court, Malta (His Honour Dr. A. Parnis), against the appellants.

The appellants in this case were the defendants in the original action. That action was brought by the present respondent against the appellants on a contract for the sale by the appellants to the respondent of anchovies f.o.b. Gibraltar. The goods were delivered and shipped to Malta and paid for, and the respondent subsequently claimed rescission of the contract and repayment of the price. The questions for decision are (1.) whether on the facts the

(1) (1885) 22 S. L. R. 830. (2) 13 App. Cas. 88, 103.
(3) [1923] 2 K. B. 490.

respondent was entitled to rescind; (2.) whether, if he had that right, he has not lost it by his own acts and conduct in accepting and dealing with and retaining the goods. These were the issues raised on the pleadings and considered in the judgments. This case involves, in the first place, the question whether the contract of sale is governed by the law of Gibraltar or of Malta.

The contract under which the present dispute has arisen is contained in telegrams which passed between the appellants and respondent on December 4 and 5, 1917, and confirmed by letters between them dated December 5, 1917. These are hereafter set out. By the contract the appellants agreed to sell to the respondent 9/10,000 kilos anchovies in brine at a price of 1*s*. 5*d*. per kilo, f.o.b. Gibraltar. Payment was to be made against shipping documents through a bank at Gibraltar. It was subsequently agreed that the quantity of the anchovies should be reduced to 7320 kilos, and finally to 6657 kilos.

The goods were shipped on December 28, 1917, and invoiced to the respondent on December 31, 1917, at a price of 509*l*. 0*s*. 9*d*., which included a sum of 37*l*. 10*s*. in respect of freight from Gibraltar to Malta. The respondent paid the invoice price to the appellants early in January, 1918. The goods arrived at Malta on January 10, 1918. By a letter dated January 22, 1918, the respondent made certain complaints to the appellants as to the packing of the goods and as to their quality. There was no suggestion in that letter that the respondent had rejected or intended to reject the goods. On the contrary the respondent made a claim against the appellants for a sum of 44*l*. 12*s*. 6*d*. in respect of an alleged short delivery of 630 kilos.

Previous to their arrival in Malta the respondent had resold all the goods to other purchasers. From the respondent's evidence in a case of *Borg* v. *Spiteri Debono* it appears (1) that the respondent tendered the goods to his sub-purchasers, all of whom, excepting Borg, refused to accept the goods on the ground that the tins in which they

(1) From the record.

J. C. 1924 BENAIM & Co. v. L. S. DEBON

were packed were not like those agreed upon in the sub-contract. Borg subsequently started proceedings against the respondent claiming to rescind his contract.

On March 7 a referee appointed by the Commercial Court, Malta, in the case of *Borg* v. *Spiteri Debono* reported that the anchovies sold by the respondent to Borg, which were part of the consignment bought by the respondent from the appellants, were (i.) not unfit for human food and were (ii.) merchantable but of inferior quality, being of smaller dimensions than ordinary anchovies, and owing to their recent preparation had an odour and taste somewhat less pronounced.

A writ was issued by the respondent against the appellants on April 2, 1918, claiming that the sale of the said anchovies be declared rescinded and that the appellants be condemned to refund the price, together with the freight and insurance premiums paid by the respondent; there was also a claim for damages.

By their defence the appellants contended (1.) that the anchovies were according to order and in every respect fit for human food and merchantable; (2.) that it was not the fault of the appellants if the anchovies could not be sold on the Malta market; (3.) that the respondent had accepted the goods, having after examining the quality of the fish asked only to be credited with an alleged shortage of 44*l.* 12*s.* 6*d.* sterling and having offered the goods by auction on his own account.

By an interlocutory order of the Commercial Court dated April 16, 1918, Salvatore L. Calleja was appointed referee and required (inter alia) to report upon the condition of the anchovies without prejudice to the interests of the contending parties. On April 25, 1918, Calleja reported that the anchovies were bitter and unsaleable upon the Malta market. By sworn evidence given on May 27, 1918, Calleja explained and qualified the report as follows: "By having stated in my report that the goods are not saleable in Malta I do not intend to say that they are saleable or unsaleable abroad as I have no knowledge of other than the local market. When

I saw the goods they were good as to consistency but their defect consisted in their being bitter."

The action was heard by the Commercial Court and judgment delivered by His Honour Dr. A. Parnis on September 28, 1921. By that judgment His Honour Dr. A. Parnis allowed the first claim of the respondent, limited to the rescission of the sale with costs. He held that the anchovies were of a quality inferior to the medium and that upon this ground the respondent was entitled to claim rescission of the sale; he further held that the respondent had not so accepted the goods as to deprive him of the said right.

The appellants appealed to the Court of Appeal, which affirmed the decision of the Commercial Court and dismissed the appeal with costs.

For the purpose of this appeal it is necessary first to determine whether the contract between the parties, and the performance of it, is subject to the law of Gibraltar or to that of Malta.

Several communications having passed, an agreement was come to, the respondents at Malta writing on December 5, 1917, to the appellants at Gibraltar as follows: "We confirm our letter of the 3rd inst. in its full contents, and have to acknowledge the receipt your valued cable of yesterday's date (received this morning) reading as follows: 'Accept 9/10,000 kilos anchovies seventeen pence f.o.b. Gibraltar, open credit, all weighing 22/25 kilos, approximately, except 140 tins, ten kilos four barrels, altogether 240,' to which we have promptly replied by cabling you thus: 'Accept ten thousand kilos anchovies in brine, 1917 fishing, seventeen pence kilo nett, f.o.b. Gibraltar. Packing included four barrels, about 240 kilos, altogether excluded, we require tins weighing not over twenty-five kilos,' which we confirm. The above cable is self explanatory and therefore it is useless to transcribe it plainly. We now await your cable reply to open you the required credit as follows: '10,000 kilos anchovies in brine, at 1*s.* 5*d.* per kilo. nett, f.o.b. Gibraltar. 708*l.* 6*s.* 8*d.*, plus freight."

J. C. 1924 BENAIM & Co. v. L. S. DEBONO.

In the judgment of the Court of Appeal in Malta it was held that this contract, and all that followed from it, was governed by the law of Malta—which is in effect the Civil Law. In fact, no one then contended that the law of Gibraltar applied.

No doubt this contract should be regarded as made in Malta—for thence came the final acceptance by the respondent of the offer made by the appellants. But it appears to their Lordships to be plain upon the face of the documents that the contract was to be performed by the delivery of the goods on board a ship at Gibraltar selected by the respondent; from the moment of such delivery the appellants had no further control over the goods, and had parted with their possession and property in them.

The principle of law here applicable is thus stated by Mr. Dicey in his book the Conflict of Laws, 3rd ed., p. 609: "When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (lex loci solutionis)." That statement of the law is in full accordance with the judgment of the Court in *Jacobs* v. *Crédit Lyonnais* (1) and the authorities there cited.

Now, the law of Gibraltar relating to the sale of goods is to be found in Ordinance No. 20 of 1895, which codified the law; s. 35 of that Ordinance provides: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

In this case it is beyond dispute that the manner in which the respondent dealt with the goods in question after their arrival at Malta was entirely inconsistent with the ownership

(1) 12 Q. B. D. 589.

of the seller according to this law of Gibraltar, which is merely the law of England. It is therefore unnecessary to decide whether the acts of the respondent by way of rescission are justifiable under the law of Malta, for that is beside the point.

In the opinion of their Lordships, the respondent had parted with his right to reject the goods, and to rescind the contract, which is the question here to be decided. But he may still, possibly, have rights entitling him to recover damages for breach of contract in regard to the condition or quality of the goods delivered and accepted. No such claim, however, has come before this Board; and it is suggested that should it be made, it must fail, as being out of time.

The point of view from which their Lordships regard this case was never brought to the notice of the learned judges who gave judgment in Malta; and there is no reason to discuss whether their decision was correct supposing the law of Malta to have applied to the making and performance of the contract.

In their Lordships' opinion the appellants are entitled to judgment in this appeal. But they consider that they are not entitled to any costs in the Courts of Malta, seeing that they never there took the point upon which their Lordships consider they should here succeed.

Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs and the action dismissed. The order as to costs in the Court below should stand.

Solicitors for appellants: *Coward & Hawksley, Sons & Chance.*

Solicitors for respondent: *Thomas Cooper & Co.*

H. L. (E.)* 1924 March 18.

ELDER, DEMPSTER AND COMPANY, LIMITED, AND OTHERS . . . . . } APPELLANTS;

AND

PATERSON, ZOCHONIS AND COMPANY, LIMITED . . . . . } RESPONDENTS.

GRIFFITHS LEWIS STEAM NAVIGATION COMPANY, LIMITED . . . } APPELLANTS;

AND

PATERSON, ZOCHONIS AND COMPANY, LIMITED . . . . . } RESPONDENTS.

Shipping—Bill of Lading—Damage to Cargo—Whether due to bad Storage or to Unseaworthiness—Construction of Conditions in Bill of Lading.

A shipping company ran a line of cargo steamers to West African ports for the carriage of West African produce. These vessels had their holds fitted with 'tween decks, so as to relieve the cargo stored in the lower part of the holds from the weight of the cargo stored in the upper part. This company (hereinafter called "the charterers"), requiring an additional vessel for their West African trade, chartered from another company (hereinafter called "the shipowners") on a time charter a ship of the Isherwood type with deep holds and no 'tween decks. This ship loaded at a West African port a large number of casks of palm oil, which were properly stored in tiers at the bottom of the holds, and also loaded a large number of bags of palm kernels, which for the most part were stowed over the casks of palm oil. The palm kernels being very heavy crushed the casks of palm oil, so that before the ship left port the bilge wells of the holds had three feet of oil in them, and on the arrival of the ship at her destination in England the greater part of the oil was lost or damaged. The bills of lading under which the palm oil was shipped protected the charterers from damage due to bad stowage.

In an action by the shippers of the palm oil against the charterers and the shipowners for damages for breach of the contract of carriage evidenced by the bills of lading, or, alternatively, for negligence or breach of duty:—

Held (1.) (by Viscount Cave, Lord Dunedin, Lord Sumner, and Lord Carson; Viscount Finlay dissenting) that, the ship being structurally fit to carry the palm oil at the time when it was loaded, the damage was due not to the unseaworthiness of the ship for the cargo by reason of the absence of 'tween decks, or the non-provision of a temporary 'tween deck, but to bad stowage, and that, consequently, the charterers were protected by the exceptions in the bills of lading.

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* *Present:* VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER and LORD CARSON.

(2.) That in the circumstances the shipowners were entitled to the same protection.

Order of the Court of Appeal [1923] 1 K. B. 420 reversed.

APPEALS from an order of the Court of Appeal (1) affirming a judgment of Rowlatt J.

The appeals arose out of an action brought by the respondents, the shippers, against the first-named appellants, the charterers, and their co-appellants, the shipowners, for damage to a part cargo of palm oil in casks carried from two West African ports to Hull in the steamship *Grelwen*. The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the opinions of Viscount Cave and Viscount Finlay.

Rowlatt J. gave judgment for the respondents for an amount to be agreed between the parties or settled by a referee, and his judgment was affirmed by the Court of Appeal by a majority (Bankes L.J. and Eve J.; Scrutton L.J. dissenting).

These appeals were twice argued.

Feb. 19, 21; Feb. 22. *R. A. Wright K.C.* (with him *D. N. Pritt*) for the appellants in the first appeal. This is a case not of unseaworthiness but of bad stowage. Unseaworthiness does not apply to a case where the captain stowing his ship puts different parcels in the same hold, so that they damage each other: *The Thorsa* (2); *Bond, Connolly & Co.* v. *Federal Steam Navigation Co.* (3) The implied warranty of seaworthiness, in its ordinary and wider sense of seaworthiness as a ship, means that the ship must be fit to encounter the perils of the sea, but the term is also used to denote a narrower warranty, which relates to the fitness of the ship to carry the cargo which it contracts to carry. The two warranties are quite distinct and attach at different times; the wider warranty attaches at the time when the ship sails, the narrower at the time when the cargo is received: *McFadden* v. *Blue Star Line.* (4) In that case Channell J. gives a clear analysis

(1) [1923] 1 K. B. 420.
(2) [1916] P. 257, 261, 263.
(3) (1905) 21 Times L. R. 438; (1906) 22 Times L. R. 685.
(4) [1905] 1 K. B. 697, 703–7.

H. L. (E.) 1924

ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co.

GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co.

of the two kinds of warranty, and shows that the warranty of the fitness of the ship to carry the cargo attaches at the time of loading and does not continue after the goods are loaded. Bad stowage may amount to unseaworthiness where the stowage of the cargo affects the safety of the ship: *Ingram and Royle* v. *Services Maritimes du Tréport* (1); *Kopitoff* v. *Wilson* (2); but that is not this case. Illustrations of the unfitness of the ship to receive the cargo are to be found in *The Maori King* (*Cargo Owners*) v. *Hughes* (3); *Tattersall* v. *National Steamship Co.* (4); *Queensland National Bank* v. *Peninsular and Oriental Steam Navigation Co.* (5); *Ciampa* v. *British India Steam Navigation Co.* (6); *Upperton* v. *Union Castle Mail Steamship Co.* (7) In all those cases the ship at the moment of shipment was unfit as a ship to receive the cargo. It is true that in the *Maori King* (3) A. L. Smith L.J. speaks of the warranty operating at the time of setting sail, but there was there no relevance in the distinction, and there is no ground for supposing that he intended to differ from his colleagues. Whether the warranty of seaworthiness is used in its wider or more restricted sense, the test, as stated by Lord Cairns in *Steel* v. *State Line Steamship Co.* (8) is, Is the ship reasonably fit for performing the service which she undertakes? Here the implied warranty is limited to this, that the ship is reasonably fit to carry the particular cargo the subject matter of the contract. The absence of 'tween decks, on which so much reliance has been placed by the Court of Appeal, is not material where the sole obligation under the warranty is to find a ship fit to carry the particular cargo, not the particular cargo plus the superimposed cargo. There is no obligation on the appellants to build a temporary 'tween deck, which would involve a structural alteration of the ship at a great expense and delay and a weakening of the frame of the ship. To require the entire reconstruction of the ship's hold is altogether beyond what is reasonable.

(1) [1913] 1 K. B. 538.
(2) (1876) 1 Q. B. D. 377.
(3) [1895] 2 Q. B. 550, 555, 557.
(4) (1884) 12 Q. B. D. 297, 301.
(5) [1898] 1 Q. B. 567, 572.
(6) [1915] 2 K. B. 774, 780.
(7) (1903) 9 Com. Cas. 50.
(8) (1877) 3 App. Cas. 72, 76, 77.

[He also contended upon the construction of the bills of lading that the provisions thereof relating to seaworthiness ousted the implied warranty of seaworthiness, and that consequently the charterers were protected in any event by the exceptions in the bills of lading, and on this point he referred to *Bank of Australasia* v. *Clan Line Steamers* (1) and *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.* (2)]

Neilson K.C. (with him *Clement Davies*) for the appellants in the second appeal. The conditions of the bills of lading protect the shipowners, because to the knowledge of all parties the goods were received on the terms of the contract therein contained. The shipowners were only the agents of the charterers and as such agents are entitled to the same protection as the charterers.

Jowitt K.C. and *Le Quesne* for the respondents. In this case there has been no difference of judicial opinion as to the law; the only difference is as to the true inference to be drawn from the facts. In considering seaworthiness in its narrower sense the fact that this is an Isherwood ship and is classed at Lloyd's as A1 is irrelevant; the question is whether she was lacking in the necessary equipment for the class of cargo she contracted to carry. The cargo is to be looked at as a whole, because, on the evidence, this was a typical West African cargo. The carriage of a mixed cargo of palm oil and palm kernels was not a fortuitous happening, but was a recognized feature of the West African trade. The entire West African trade is carried in 'tween deck ships. Big single hold ships are not properly equipped for a composite cargo, part of which is fragile, by reason of the absence of 'tween decks, unless the precautions suggested by the respondents are taken. The suggested construction of a temporary 'tween deck is not fantastic, as the appellants have contended. This is a case of a well found ship diverted to a trade for which she was not fitted. She went out without any machinery for erecting temporary 'tween decks, which could have been done without danger to the ship at no very great expense. Both the Courts below have concurred in

(1) [1916] 1 K. B. 39. (2) [1922] 2 A. C. 250.

H. L. (E.) 1924 ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co. GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co.

finding that this vessel did lack the necessary equipment for the cargo which she carried. There are therefore in this case concurrent findings of fact which ought not to be disturbed. That unseaworthiness is a question of fact is shown by *Upperton* v. *Union Castle Mail Steamship Co.* (1) The evidence also establishes that this composite cargo could not have been distributed better than it was. If this vessel lacked the necessary equipment, not absolutely, but relatively to the particular cargo, she was unseaworthy, in the limited sense applicable to this case, within Lord Cairns's definition in *Steel* v. *State Line Steamship Co.* (2) ; *The Schwan* (3) ; *Hogarth* v. *Walker* (4) ; *Hedley* v. *Pinkney & Sons Steamship Co.* (5) ; Marine Insurance Act, 1906, s. 40, sub-s. 2. It is said that the question of the fitness is to be considered qua palm oil only. The respondents contest this on two grounds: (1.) that it was the recognized custom of the West African trade to carry palm oil and palm kernels in the same ship ; and (2.) that the crucial time for considering the warranty of seaworthiness, whether in its wider or more restricted sense, is the commencement of the voyage, and at that time the palm kernels had been placed above the palm oil.

[LORD SUMNER referred to *Wade* v. *Cockerline.* (6)]

On the facts this may fairly be treated as a case of absence of necessary equipment and not as a case of two incongruous cargoes. In *The Thorsa* (7), as is pointed out by Swinfen Eady L.J., no question of equipment arose. Here the unseaworthiness consists in the non-provision of a 'tween deck. Assuming that unseaworthiness is proved, there is nothing in the bills of lading to take this case out of the rule, that if there is a breach of the implied warranty of seaworthiness the exceptions in the bill of lading afford no protection. As to the owners, the respondents' goods being lawfully upon their ship, they are liable in tort if the goods are damaged by their negligence, and it is no answer to the claim to say that

(1) 9 Com. Cas. 50.
(2) 3 App. Cas. 72, 76.
(3) [1909] A. C. 450.
(4) [1899] 2 Q. B. 401 ; [1900] 2 Q. B. 283.
(5) [1894] A. C. 222, 228.
(6) (1904-5) 10 Com. Cas. 47, 115.
(7) [1916] P. 257, 261.

they had a contract with a third party: *Martin* v. *Great Indian Peninsula Ry. Co.* (1); *Hayn* v. *Culliford* (2); *The Termagant* (*Cargo Owners*) v. *Page, Son, & East* (3); *Meux* v. *Great Eastern Ry. Co.* (4); *Foulkes* v. *Metropolitan District Ry. Co.* (5); *The Ferro* (6): see also *Delaurier* v. *Wyllie.* (7) If the owners were parties to the contract of carriage evidenced by the bills of lading this argument would not apply, but, so far as the evidence goes, they neither knew nor cared anything about the bills of lading. There is no ground for saying that the owners are the servants or agents of the charterers or for implying an agreement that they were to handle the goods on the terms of the bills of lading; indeed the conditions of the bills of lading are opposed to any such assumption: *The Okehampton.* (8)

R. A. Wright K.C. in reply on the first appeal. There can be no question of concurrent findings, because unseaworthiness is not a pure question of fact, but is a question of mixed fact and law. There was here no obligation on the master to fill the ship, and if and so far as he could not stow the palm kernels without endangering the existing cargo he should have refused to take them.

Neilson K.C. in reply on the second appeal cited *Bristol and Exeter Ry. Co.* v. *Collins.* (9)

The House took time for consideration.

1924. March 18. VISCOUNT CAVE (read by LORD CARSON). My Lords, the appellants Elder, Dempster & Co., Ld., who are managers for the appellants the African Steam Ship Company and the British and African Steam Navigation Company, Ld., run to the West African ports a line of cargo steamers which carry West African produce. These vessels have their holds fitted with 'tween decks, so that goods stored in the lower part of the hold may be relieved

(1) (1867) 37 L. J. (Ex.) 27, 31, 32.
(2) (1879) 4 C. P. D. 182.
(3) (1914) 19 Com. Cas. 239.
(4) [1895] 2 Q. B. 387, 391.
(5) (1880) 5 C. P. D. 157.
(6) [1893] P. 38.
(7) (1889) 17 R. 167.
(8) [1913] P. 173, 181.
(9) (1859) 7 H. L. C. 194, 233.

H. L. (E.) 1924 ELDER, DEMPSTER & CO. v. PATERSON, ZOCHONIS & CO. GRIFFITHS LEWIS STEAM NAVIGATION CO. v. PATERSON, ZOCHONIS & CO. Viscount Cave.

from the weight of those stored in the upper part. The appellants Elder, Dempster & Co., requiring an additional vessel for their West African trade, chartered from the appellants the Griffiths Lewis Steam Navigation Company, Ld. (whom I will refer to as "the owners"), the steamship *Grelwen*, a ship of the Isherwood type containing deep holds but no 'tween decks. The *Grelwen* proceeded to the Sherbro River, where she loaded from the respondents Paterson, Zochonis & Co., Ld., 297 casks or butts of palm oil, which were stowed in two or three tiers at the bottom of holds 2, 3 and 4. She also loaded there from the respondents and other shippers about 51,800 bags of palm kernels, which were stowed partly over the casks of palm oil in holds 2 and 4 (thus completely filling those holds) and partly in other parts of the ship. The vessel then proceeded to the port of Konakri, where she loaded from the respondents a further 147 butts of palm oil, which were stowed at the bottom of No. 3 hold, and also loaded from the respondents and others about 11,400 more bags of palm kernels, which were stowed partly over the palm oil in No. 3 hold (thus filling that hold) and partly elsewhere. She also loaded some piassava and other miscellaneous produce, which was stowed in the space between the main and shelter decks.

When the vessel arrived at Hull, which was her destination, it was found that the casks and butts of palm oil in holds 2, 3 and 4 had been crushed by the palm kernels stored above them, which were very heavy—it was stated in evidence that each cask had to carry 64 bags of palm kernels or nearly 6 tons in weight—and the greater part of the oil was lost or damaged. The casks must have begun to give way immediately after the palm kernels were stowed above them; for the log shows that before the vessel left the Sherbro River she had 3 feet of palm oil in the bilge well of No. 2 hold, and that before she left Konakri the same thing had happened in hold No. 3; but it is possible that the leakage continued after the vessel left port and was intensified by the rolling of the ship.

The respondents accordingly commenced this action against

the appellants, claiming damages for breach of the contract entered into by the bills of lading under which the palm oil was shipped, or alternatively for negligence or breach of duty. The defendants at the trial attempted to prove that the casks and butts were frail or leaky; but this attempt failed, and it is not now denied that the damage was caused by the altogether unreasonable and excessive weight placed upon the casks. This being so, the contest resolved itself into the question whether the damage was due to bad stowage, or to the fact that the vessel was structurally unfit or unseaworthy for the carriage of the palm oil by reason of the depth of her holds and the absence of 'tween decks. It was not denied that if the damage was due to bad stowage the charterers are protected against liability by the conditions contained in the bills of lading; but if it was due to unseaworthiness, then it was contended (and I think rightly) that the charterers were not protected by any of the conditions of the bills of lading and were liable to make good the damage.

The action was tried by Rowlatt J., who held that, while the ship was well found for the purpose of traversing the sea, she was "not a ship, in the way she was prepared for this voyage, proper to carry these casks of palm oil"; and he added: "This was a ship which was not a 'tween deck ship. It had a deep hold of a depth of 25 feet, and you cannot safely get in at the bottom of that hold casks of palm oil with any sort of a cargo of dead weight or approaching dead weight of gravity on the top of it, and therefore it is a hold which you cannot put those casks in at the bottom, which is the place to put them. It could have been made proper for the stowage of such a cargo by the erection of what has been called a temporary 'tween deck or a platform, by the erection of something (to use perfectly plain and popular language) which would tend to keep the weight of the superincumbent cargo off the bilges of the barrels. That could have been done, and then the hold would have been fit to receive this cargo. That seems to me a fault which goes to the hold. It is not a fault which goes to the stowage as stowage. It is a fault which goes to the appliances for shipping the cargo safely, and makes the ship

H. L. (E.) 1924

ELDER, DEMPSTER & CO. v. PATERSON, ZOCHONIS & CO.

GRIFFITHS LEWIS STEAM NAVIGATION CO. v. PATERSON, ZOCHONIS & CO.

Viscount Cave.

unseaworthy for the purpose of carrying this cargo on this voyage." He accordingly gave judgment against all the defendants for damages and ordered an inquiry. On appeal the decision of the trial judge was affirmed by a majority of the Court of Appeal, consisting of Bankes L.J. and Eve J.; but Scrutton L.J. dissented, holding that the damage was due to bad stowage. Scrutton L.J. stated the principle as follows (1): "The ship must be fit at loading to carry the cargo the subject of the particular contract. If she is so fit, and the cargo when loaded does not make her unseaworthy, ... the fact that other cargo is so stowed as to endanger the contract cargo, is bad stowage on a seaworthy ship, not stowage of the contract cargo on an unseaworthy ship." Thereupon the present appeal was brought.

My Lords, it was contended on behalf of the respondents that the finding of the trial judge was one of fact, and that as there was evidence to support that finding it should not now be disturbed. I do not think that this position can be maintained. The facts are not now seriously in dispute, and the question is substantially one of law—namely, what on those facts is the liability of the charterers and owners?—or at least one of mixed fact and law. I think, therefore, that the decision is open to review.

The general principles which should govern the decision are not in doubt. It is well settled that a shipowner or charterer who contracts to carry goods by sea thereby warrants, not only that the ship in which he proposes to carry them shall be seaworthy in the ordinary sense of the word—that is to say, that she shall be tight, staunch and strong, and reasonably fit to encounter whatever perils may be expected on the voyage—but also that both the ship and her furniture and equipment shall be reasonably fit for receiving the contract cargo and carrying it across the sea. The latter obligation, which is sometimes referred to as a warranty of seaworthiness for the cargo, was formulated by Lord Ellenborough in the year 1804: see *Lyon* v. *Mells* (2), and was affirmed by this House in *Steel* v. *State Line*

(1) [1923] 1 K. B. 438. (2) (1804) 5 East, 428.

Steamship Co. (1) and *Gilroy, Sons & Co.* v. *Price & Co.* (2) The rule, as it applies to equipment, is well illustrated by such cases as *Owners of Cargo on Ship Maori King* v. *Hughes* (3), where a ship with defective refrigerating machinery was held "unseaworthy" for a cargo of frozen meat; and *Queensland National Bank* v. *Peninsular and Oriental Steam Navigation Co.* (4), where a ship with a bullion room not reasonably fit to resist thieves was held "unseaworthy" for a consignment of bullion. Reference may also be made to *Hogarth* v. *Walker* (5), where it was said by Bigham J. and A. L. Smith L.J., that a ship without dunnage mats (which are usually laid on the floor of a grain ship to protect the grain from being damaged by wet) was unseaworthy for the carriage of a cargo of wheat. It is hardly necessary to add that unseaworthiness and bad stowage are two different things. There are cases, such as *Kopitoff* v. *Wilson* (6), where, a ship having been injured in consequence of bad stowage, the warrant of seaworthiness of the ship has been held to be broken; but in such cases it is the unseaworthiness caused by bad stowage and not the bad stowage itself which constitutes the breach of warranty. There is no rule that, if two parcels of cargo are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy: per Swinfen Eady L.J. in *The Thorsa.* (7)

Applying these principles to the present case, I have come to the conclusion that the damage complained of was not due to unseaworthiness but to improper stowage. If the fitness or unfitness of the ship is to be ascertained (as was held in *McFadden* v. *Blue Star Line* (8)) at the time of loading, there can be no doubt about the matter. At the moment when the palm oil was loaded the *Grelwen* was unquestionably fit to receive and carry it. She was a well built and well found ship, and lacked no equipment

(1) 3 App. Cas. 72.
(2) [1893] A. C. 56, 62.
(3) [1895] 2 Q. B. 550.
(4) [1898] 1 Q. B. 567.
(5) [1899] 2 Q. B. 401; [1900] 2 Q. B. 283.
(6) 1 Q. B. D. 377.
(7) [1916] P. 257.
(8) [1905] 1 K. B. 697.

H. L. (E.) 1924 — ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co. — GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co. — Viscount Cave.

necessary for the carriage of palm oil; and if damage arose, it was due to the fact that after the casks of oil had been stowed in the holds the master placed upon them a weight which no casks could be expected to bear. Whether he could have stowed the cargo in a different way without endangering the safety of the ship is a matter upon which the evidence is conflicting; but if that was impossible, he could have refused to accept some part of the kernels and the oil would then have travelled safely. No doubt that course might have rendered the voyage less profitable to the charterers, but that appears to me for present purposes to be immaterial. The important thing is that at the time of loading the palm oil the ship was fit to receive and carry it without injury; and if she did not do so this was due not to any unfitness in the ship or her equipment, but to another cause.

But it was argued that an owner or charterer loading cargo is to be deemed to warrant the fitness of his ship to receive and carry it, not only at the moment of loading, but also at the time when she sails from the port, and that at the moment when the *Grelwen* left each of her ports of departure she was unfit without 'tween decks to carry the cargo which had then been placed in her holds. My Lords, I think there is some authority for the proposition that the implied warranty of "seaworthiness for the cargo" extends to fitness for the cargo not only at the time of loading, but also at the time of sailing: see *Cohn* v. *Davidson* (1), and the observations of Phillimore L.J. in *The Thorsa*. (2) But it is unnecessary to pursue the point, for the proposition if established will not avail the present respondents. The evidence of the log is conclusive to show that the injury to the casks was caused at or immediately after the time when the cargo was loaded and before the ship sailed, and accordingly that it was not due to any unseaworthiness at the time of sailing. And in any case nothing occurred between the time when the oil was loaded and the time when the ship sailed to make the ship structurally less fit to carry the oil; and it is with reference

(1) (1877) 2 Q. B. D. 455. (2) [1916] P. 257.

to the contract cargo—namely, the oil—that the question of fitness must be considered.

It was further argued that, as all the charterers' own ships engaged in the West African trade were fitted with 'tween decks, that equipment must be considered to be reasonably necessary for any vessel engaged in that trade. I do not think that any such universal rule can be properly laid down. It cannot be assumed that every ship running to the West African coast will bring back a cargo of palm oil and palm kernels, or that if she does so it will always be necessary to stow them together in one hold. The *Grelwen*, though without 'tween decks, could have carried a full cargo of West African goods without the oil, or could have carried the oil without the heavy cargo laid upon it. If the oil could not be stowed anywhere except at the bottom of the holds, the master could (as the evidence shows) have stowed four tiers of casks in each hold, and could have utilized the space above them for light cargo or could have left it empty; and the fact that he did not choose to take either of these courses is not sufficient to condemn the ship as unseaworthy.

On this view it becomes unnecessary to consider whether, in the event of unseaworthiness being found, the conditions of the bills of lading would have been sufficient to protect the charterers from liability. It is enough to say that, in my opinion, they are not sufficient for that purpose, the requirements of the proviso to condition 2 not having been satisfied.

There remains a further question, which arises between the shippers and the shipowners, the Griffiths Lewis Steam Navigation Company. It is contended on behalf of the respondents that, assuming their loss to be due to bad stowage on the part of the master of the ship, the owners are not protected by the conditions of the bill of lading, to which they were not parties, and are accordingly liable in tort for the master's negligence. In support of this contention the respondents rely on such cases as *Martin* v. *Great Indian Peninsula Ry. Co.* (1); *Hayn* v. *Culliford* (2); and *Meux* v. *Great Eastern Ry. Co.* (3) I do not think that this argument

(1) 37 L. J. (Ex.) 27. (2) 4 C. P. D. 182. (3) [1895] 2 Q. B. 387.

H. L. (E.) 1924

ELDER, DEMPSTER & CO. v. PATERSON, ZOCHONIS & CO.

GRIFFITHS LEWIS STEAM NAVIGATION CO. v. PATERSON, ZOCHONIS & CO.

Viscount Cave.

should prevail. It was stipulated in the bills of lading that "the shipowners" should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Scrutton L.J. says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals.

For the above reasons I am of opinion that this appeal succeeds and that the orders of Rowlatt J. and the Court of Appeal should be set aside and the action dismissed with costs in both Courts and in this House.

VISCOUNT FINLAY. My Lords, in this case the action was brought by the respondents, the consignees of casks and butts of palm oil shipped at Sherbro and Konakri in West Africa for carriage to the United Kingdom. The defendants, Elder, Dempster & Co., are the managers of the African Steamship Company and the British and African Steam Navigation Company, who are also joined as defendants, and these two companies had a charter from the Griffiths Lewis Steam Navigation Company, owners of the *Grelwen* steamship, who are also defendants.

The action was brought to recover damages for loss and damage in respect of palm oil in transit by the *Grelwen* steamship. The plaintiffs alleged that this was caused by the fact that bags of palm kernels had been stowed 16 to 20 feet high on the top of the butts and casks, and that in consequence of the weight thus placed upon them many of the butts and casks were crushed and collapsed. The defendants' case was that the conditions of the bill of lading exempted the defendants from liability for bad stowage and that it was bad stowage that had caused the loss, if any. The plaintiffs, on the other hand, alleged that the vessel was structurally unfit for the carriage of the goods in respect of

the fact that there was no 'tween deck or substitute for a 'tween deck to bear the weight of the bags of palm kernels and prevent their pressure upon the butts and casks and that this constituted unseaworthiness, from liability for which they were not exempted by the bill of lading.

The substantial issue in the case is whether the absence of such a 'tween deck made the vessel unseaworthy in the sense that it was not structurally fitted for the West African trade, in which it is usual to carry cargo consisting partly of palm oil and partly of bags of palm kernels, and whether the loss was due to this unseaworthiness.

The case was tried by Rowlatt J. without a jury. He found that the vessel was not fit for the carriage of West African cargoes on the ground that she had no 'tween decks or substitute therefor, and gave judgment for the plaintiffs, the present respondents. His decision was affirmed by the Court of Appeal, Scrutton L.J. dissenting on the ground that in his opinion the damage was the result of bad stowage and that the bill of lading exempted the defendants from liability on this ground.

The law as to seaworthiness was discussed by Lord Cairns and by Lord Blackburn in the case of *Steel* v. *State Line Steamship Co.* (1) Lord Blackburn expressed himself as follows: "I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit. I think it is impossible to read the opinion of Lord Tenterden, as early as the first edition of Abbott on Shipping, at the very beginning of

(1) 3 App. Cas. 72, 86.

H. L. (E.) 1924 ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co. GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co. Viscount Finlay.

this century, of Lord Ellenborough, following him, and of Baron Parke, also, in the case of *Gibson* v. *Small* (1), without seeing that these three great masters of marine law all concurred in that; and their opinions are spread over a period of about forty or fifty years. I think, therefore, that it may be fairly said that it is clear that there is such a warranty or such an obligation in the case of a contract to carry on board ship."

For any loss or damage caused by the unseaworthiness the shipowner is liable, but the mere fact that the ship was unseaworthy does not make the shipowner liable unless the loss was caused by the unseaworthiness: *The Europa* (2) and *Kish* v. *Taylor*. (3) Bad stowage does not, in itself, constitute unseaworthiness, but it may be such as to render the vessel unseaworthy: *Kopitoff* v. *Wilson* (4) and *The Thorsa*. (5) The vessel is considered unseaworthy for this purpose if she has some defect which renders her unsuitable for the reception and carriage of the particular goods in question. For instance, the absence of a bullion room properly equipped for the carriage of bullion makes the vessel unseaworthy for the carriage of bullion: *Queensland National Bank* v. *Peninsular and Oriental Steam Navigation Co.* (6); and so if the room provided for the carriage of passengers' luggage is unfit for the purpose: *Upperton* v. *Union Castle Mail Steamship Co.* (7) Where the vessel is infectious from the carriage on a previous voyage of sheep suffering from foot-and-mouth disease, she is unseaworthy for the purpose of the carriage of other sheep: *Tattersall* v. *National Steamship Co.* (8) Many other illustrations of the application of the principle are to be found in the books.

The question in the present case is whether the *Grelwen* was unfit for the carriage of the palm oil and kernels owing to some structural defect which caused the damage

(1) (1853) 4 H. L. C. 353.
(2) [1908] P. 84.
(3) [1912] A. C. 604.
(4) 1 Q. B. D. 377.
(5) [1916] P. 257, 259, 261.
(6) [1898] 1 Q. B. 567.
(7) 8 Com. Cas. 96; 9 Com. Cas. 50.
(8) 12 Q. B. D. 297.

or whether the damage was merely the result of bad stowage. The *Grelwen* steamship was let on charter by her owners, the Griffiths Lewis Company, to Messrs. Elder, Dempster & Co., who took the charter on behalf of the African Steamship Company and the British and African Steam Navigation Company, Ld. The charter was for twelve months, the owners providing captain and crew; and cl. 10 of the charter provided that the captain, though appointed by the owners, should be under the charterer's orders as regards employment, etc.—the charterers to indemnify owners against any liabilities arising from the captain signing bills of lading. The vessel was sent under the charterparty to Sherbro and Konakri, on the West African coast, and there took on board the palm oil in respect of which this action is brought. The butts and casks containing the oil were, according to invariable practice in this trade, stowed at the bottom of the holds in tiers one above the other; there were not more than three of these tiers and in some places not more than two. It was shown in evidence that it would have been safe to have had four tiers. Planks were laid on the top of the barrels, and over these planks there were stowed a large quantity of bags containing palm kernels, the weight of which must, as the event showed, have exceeded what would have been the weight of a fourth tier of barrels, and it was this which caused the collapse.

Bills of lading were given at Sherbro and Konakri, which for the present purpose are in substantially the same terms. The most material clause is the second. It contains a provision that: "The company shall not be liable . . . . for any damage arising from other goods by stowage or contact with the goods shipped hereunder." Both Courts below have held, and rightly, that this provision would exempt the defendants from liability in the present case if it were merely a case of loss by bad stowage by putting on the barrels a weight in excess of that which they could safely bear. The contest in the case has been whether the loss was due to unseaworthiness in the sense that the vessel was structurally unfit for the reception of mixed cargoes of palm oil and palm

H. L. (E.) 1924

ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co.

GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co.

Viscount Finlay.

kernels such as are usual in the West African trade, and if so whether this clause No. 2 exempts the charterers and owners from liability for loss arising from such unseaworthiness.

All the vessels regularly employed in this West African trade are provided with 'tween decks. The African Steamship Company and the British and African Steam Navigation Company wanted a vessel in addition to their own fleet, and for this purpose, through Elder, Dempster & Co., took on charter the *Grelwen*. The case made for the plaintiffs, which was accepted by Rowlatt J. and by the majority of the Court of Appeal, was that for the West African trade a 'tween deck or some efficient substitute is an essential part of the equipment of the vessel, and that without it a vessel is not seaworthy for the purposes of the trade there carried on. The barrels containing the palm oil are stored at the bottom of the hold, and the plaintiffs urged that if the hold is to be filled up with superincumbent goods there must be 'tween decks to prevent the pressure upon the barrels below, as otherwise they may be crushed whenever the superincumbent weight exceeds what would have been the weight of a fourth tier of barrels, which is the limit of safety. Of course light goods may be safely stowed over the barrels, but the palm kernels which are very commonly shipped from West Africa are deadweight goods, and it was urged that without 'tween decks the vessel was not fit to receive and carry composite cargoes of palm oil and kernels, such as are usual in this trade.

In my opinion, the contention of the plaintiffs on this point is made good by the evidence. The existence of 'tween decks would have prevented the danger which caused the damage in the present case. The captain stated in his evidence that he was told by the representative of Elder, Dempster & Co. what to load. It would of course have been possible for him to refuse to load all the bags of palm kernels sent down for shipment, on the ground that the weight upon the barrels would in his opinion be excessive, and to leave the bags of palm kernels behind. It is, however, obvious that the

absence of any provision in the ship for relieving the barrels of palm oil from pressure of the superincumbent cargo must be a source of danger and that it puts the captain into a very awkward position. The captain will be naturally desirous not to leave behind goods which have been sent down for shipment, and the question whether the weight is too great or not will be in every case a matter of estimate—and the captain's estimate may be wrong. As the practice of the trade involves the superimposition over the palm oil barrels of bags of palm kernels, it is only reasonable that there should be 'tween decks which will relieve the barrels from the superincumbent pressure and enable the ship to take a full cargo with safety. I think that for the purpose of this particular trade, involving the carriage of cargoes consisting of barrels of palm oil and bags of palm kernels, a vessel without 'tween decks would not be properly equipped. For safe stowage of such a cargo 'tween decks or some efficient substitute will be necessary, and without such equipment the vessel is not seaworthy, as this term is used to denote not merely fitness of the ship itself to encounter perils of the sea but also fitness of the ship itself to receive and carry the cargo in port and upon the voyage. If the ship is not fitted with all appliances which are reasonably necessary for safe stowage she is not seaworthy. All ships regularly engaged in this trade have 'tween decks, and if a vessel without 'tween decks is put upon such service she ought to be provided with a temporary substitute. If the *Grelwen* had been so provided the loss in the present case would not have occurred.

Seaworthiness, in its proper sense, relates to the condition of the vessel as regards its capacity to perform the voyage with safety to itself and the goods and persons on board. Is the vessel fit to cope with the perils of the seas? The "seaworthiness" which is in question in the present case is of a totally different nature, and relates to the fitness of the vessel for the reception of particular goods, and the absence of such fitness is described as "unseaworthiness." It is unfortunate that for this purpose no more suitable term has been devised, as the use of the term "unseaworthiness"

H. L. (E.) 1924

ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co.

GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co.

Viscount Finlay.

in this connection is apt to lead to confusion. The term "unseaworthy" is not apt to describe the unfitness of the vessel for the carriage of particular goods. For instance, a vessel which has no strong room for the carriage of bullion is described as unseaworthy for the purposes of bullion, and a vessel which has carried sheep suffering from foot-and-mouth disease without being disinfected at the close of that voyage is described as unseaworthy for the carriage of another cargo of sheep. The expression is at once awkward and misleading. The unseaworthiness alleged in the present case is the absence of a 'tween deck. The *Grelwen* was of the Isherwood type, and vessels of the Isherwood type have not the ordinary 'tween deck. For work of many kinds, such a type of vessel may be as good as or better than a type involving the use of 'tween decks, and certainly the Isherwood type is extensively used. In the course of the present case it has been said more than once that it cannot be supposed that the Isherwood type involves unseaworthiness. This is really a play upon words. What is urged for the respondents is, that with all its excellences, the Isherwood type makes a vessel unsuitable for the reception of cargoes of the special type common in the West African trade. This contention involves no aspersion whatever upon the Isherwood type: it is merely a statement that such a type of vessel is not suitable for use in this particular trade, because the composite cargo there carried—palm oil and kernels—makes a 'tween deck necessary. The casks of palm oil are stowed at the bottom of the hold; in the absence of a 'tween deck they are liable to be damaged by the pressure of superincumbent kernels.

On the part of the appellants, one argument was greatly insisted on. It was said that the contract of carriage sued on in the present case related to the palm oil, and it is urged that under these circumstances the only question is whether the vessel was seaworthy for the carriage of the palm oil taken by itself. To put the question in this form involves a misconception of the real point of the case. The fact that a vessel may be perfectly safe to carry barrels of palm oil, if that were the only cargo, is for the purposes of the present

case immaterial. The unfitness of the vessel alleged is unfitness to receive a composite cargo of palm oil and kernels. Such a cargo is the common cargo from West Africa, and the cargo to be carried on the present occasion was such a composite cargo. In dealing with the case you cannot stop when the palm oil has been put on board and say that the case is at an end, as the warranty of unseaworthiness must be with reference merely to the palm oil. This would involve ignoring the real issue. It was perfectly well known that in this trade the palm oil is not carried alone, but in company with kernels. The palm oil must be put at the bottom of the hold and the kernels above. It is for this reason that the 'tween deck is wanted, and therefore all the vessels regularly engaged in the West African trade are fitted with 'tween decks. The essence of the case is that the cargo was to be composite, as the bill of lading shows, and as is universally the case in this trade. Was the *Grelwen* fit for the reception of such a cargo ? In my opinion she was not.

But then it was said that the stowage was bad and that this was the real cause of the damage.

In the first place, suggestions were made at the Bar as to other plans of stowage, which it was said would have accommodated all the goods without difficulty. None of these plans were put forward at the trial, when they could have been tested by evidence, and they cannot be put forward now. The same attempt to suggest other schemes of stowage for this vessel seems to have been made in the Court of Appeal, and it was with reference to such suggestions that Bankes L.J. made, with great justice, the following observations (1) : " In dealing with this case I do not think that the Court is at liberty to take the stowage plan and endeavour to restow the cargo, so that damage could have been avoided. No one has suggested that it would have been possible, and the Court has no evidence on which to act." I think that in the result the appellants' counsel did not press the point that another scheme of stowage should have been adopted, but confined themselves to the assertion that the captain ought to have

(1) [1923] 1 K. B. 435.

H. L. (E.) 1924

ELDER, DEMPSTER & CO. v. PATERSON, ZOCHONIS & CO.

GRIFFITHS LEWIS STEAM NAVIGATION CO. v. PATERSON, ZOCHONIS & CO.

Viscount Finlay.

realized that to put the kernels on the top of the palm oil barrels would be dangerous, and should therefore have refused to load the kernels and left them behind him at Sherbro and Konakri. In my opinion, this form of dealing with the stowage does some injustice to the captain and is based on an imperfect appreciation of the facts. It appears that the captain had never been engaged in the West African trade before. He was directed by Mr. Ward, the representative of Elder, Dempster & Co. at Sherbro, to load the kernels, which had been brought down for the purpose. Mr. Ward met the ship on her arrival there, stayed on board and told the captain what to load: Appendix, p. 93, E. 12.

Messrs. Elder, Dempster & Co. are, of course, quite entitled, in point of law, to urge that if the real efficient cause of the damage was negligent stowage in putting on the barrels of palm oil a weight which they could not bear, they are not liable, as the exemption in the bill of lading, whether this negligence was on the part of the captain or of their own representatives at the port of loading or of both together, would protect them. But an examination of the evidence, I think, shows that it is not possible to regard such negligence as the sole cause of the damage, and that it was largely contributed to by the want of 'tween decks in the vessel.

The evidence is clear and uncontradicted that all ships regularly engaged in the trade have a 'tween deck. A 'tween deck is necessary where palm oil and kernels have to be carried, in order to ensure that a full cargo can be carried. It is further necessary, in order to avoid the danger of mistake in calculating what quantity of kernels may with safety be put on the top of the palm oil barrels. If there is a 'tween deck, no calculation is necessary on this point, as the 'tween deck relieves the barrels of palm oil from all pressure by the superincumbent kernels. But without a 'tween deck it is necessarily left to the estimate of the person superintending the loading what amount of kernels may be safely stowed. There may be mistakes in making this calculation in one of two ways: the person superintending the loading may erroneously think that the palm oil barrels will bear an amount

of pressure which in fact is beyond their capacity. Or, on the other hand, in his anxiety to secure safety, he may stop the storage of the kernels too soon and may refuse to put on board kernels which might with safety have been there stowed. Mistakes are certain to be made from time to time in the absence of a 'tween deck. The presence of a 'tween deck, of course, dispenses with all necessity for any such calculations. If the mistake made is such as that which, it is alleged, the captain here made, putting on more weight than the palm oil barrels will bear, the results may be disastrous, as the history of the present case proves. If, on the other hand, in his anxiety to be on the safe side the kernels which could have been carried are left behind, the ship sails with an insufficient cargo. From whatever point of view the matter is looked at, for a trade of this description the 'tween deck is necessary, and this is recognized by the constant practice of having 'tween decks in this trade. In the present case its absence was accidental, as this vessel had been specially called in to supply a temporary deficiency in the fleet of the West African Company. According to the plaintiffs, the *Grelwen* ought, in the present case, to have sailed away with little more than half a cargo, owing to the absence of a 'tween deck and the danger of crushing the palm oil barrels by putting the kernels upon them. It appears to me that a type of vessel which entails such results cannot be regarded as suitable for receiving on board such composite cargoes as form a staple of the West African trade.

It is said that the captain ought to have refused to take the kernels on board. Judging by the result, it appears that it would have been more prudent to have so done, but I do not think that the difficulty of the situation in which the captain was placed has been adequately appreciated by the appellants. The kernels had been sent down to be put on board, the captain had been told by the representative on the spot of Messrs. Elder, Dempster & Co. to put them on board, and very difficult questions might have arisen if he had left the kernels at the port. It would no doubt have been alleged that they had been left behind without any adequate reason, and this would have been as strongly urged

H. L. (E.) 1924

ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co.

GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co.

Viscount Finlay.

as it is now urged, by the light of what afterwards happened, that the captain committed an error of judgment in taking the kernels on board.

The case is a very good illustration of the propriety and indeed the necessity of having in vessels in this trade a 'tween deck. Where a 'tween deck is provided no difficulty whatever of this nature can arise; the want of it puts all concerned in a very difficult position with great risk of disaster.

A good deal of argument was directed in the course of the case on behalf of the appellants to the effect that it would be difficult or impossible to rig up a temporary 'tween deck on the west coast of Africa. It has also been urged that it is not usual for vessels to carry beams for the purpose of putting up a temporary 'tween deck. Both these contentions appear to me rather to miss the point of the case. It is very probable to my mind that it would be difficult to provide beams and other appliances on the West African coast. I doubt whether it could be said that there would be much difficulty in carrying beams from England, and if the necessity for them had been realized, I have no doubt this would have been done. The truth is that the point was overlooked, and Messrs. Elder, Dempster & Co. sent this vessel out to Africa without in the least realizing what the results of sending a vessel of the Isherwood type, for the purposes of the trade on this coast, were likely to be. If the subject had been considered a vessel of another type would have been sent; the *Grelwen* was obviously unfit for this trade, and the case made is, indeed, that safety should have been secured by leaving a great deal of the proposed cargo on the beach at Sherbro and Konakri.

But assuming that the loss was the result of unseaworthiness as above explained, the question remains whether the bill of lading exempts the charterers from liability. For this purpose the second clause must be examined in detail.

That clause concludes with the general provision that it is to be in addition to and not in derogation of or in substitution for any statutory exemption or provision in favour

of the company. This particular provision is applicable to the whole of cl. 2. Apart from this last provision, cl. 2 consists of three portions, each of which begins with the words "The company shall not be liable for," and enumerates under each head the matters liability for which is excluded.

The first head begins with the initial words of the clause itself, "The company shall not be liable for" and ends with the words "or evaporation from such goods or any other goods." It provides against liability for the act of God, the King's enemies, etc., barratry, restraints of rulers, etc., the effects of disinfection, etc., the effects of climate, fire, etc., damage arising from other goods by stowage, etc., sweating, evaporation, etc. This first head forms one sentence with a full stop at the end.

The second head begins likewise with the words "The company shall not be liable for" and enumerates lighterage, etc., storage, transhipment, loss from explosion, fire, boilers, etc., damage to or defect in hull, etc., fuel, machinery, etc. Like the first head it consists of one sentence only and it ends with the words "or other appurtenances," after which follows the full stop.

The third head is as follows: "The company shall not be liable for or for any loss or damage arising from or due to collision, stranding, straining, jettison or any other peril of the sea, rivers, navigation, or land transit, of whatsoever nature or kind; whether any perils, causes or things, in this clause mentioned, are due to, or arise directly or indirectly from the wrongful act, omission or error in judgment or negligence of the company's pilot, master, officer, engineer, crew, stevedore, or any person whomsoever in the service of the company, or any person or persons or company for whose acts the company would otherwise be liable, or not, and whether on the ship carrying these goods or not; and whether due to or arising directly or indirectly from unseaworthiness of the ship, vessel, craft or lighter at the commencement of the carriage or during the carriage or any part thereof; provided in case of any loss, injury or damage

H. L. (E.) 1924 ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co. GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co. Viscount Finlay.

arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The company may entrust to experienced or qualified officers, servants or agents the duty of providing against unseaworthiness, and shall then be deemed to have fulfilled its obligation hereunder."

It should be observed that the initial words of this third head exempt from liability "for loss or damage arising from or due to collision, stranding, straining, jettison or any other peril of the sea, rivers, navigation, or land transit of whatsoever nature or kind." After this word "kind" there is a semicolon, which is followed by the words "whether any perils, causes or things in this clause mentioned are due to, or arise directly or indirectly" from negligence of master, crew, etc. Then after another semicolon follow the words "and whether due to or arising directly or indirectly from unseaworthiness." Then after another semicolon follow words containing the proviso that in case of loss or unseaworthness of the ship "at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness." Then follows in a separate sentence the provision that the company may entrust to qualified officers, etc., the duty of providing against unseaworthiness "and shall then be deemed to have fulfilled its obligation hereunder."

The appellants contend that the effect of this third head of cl. 2 is to exempt them from liability for the consequences of unseaworthiness.

In my opinion, this contention fails for two reasons.

In the first place the words as to unseaworthiness in this head relate only to a loss or damage from the causes to which this head 3 of the clause relates. The sentence provides that the company shall not be liable for consequences of certain perils, whether due to or arising from unseaworthiness or not. It is quite impossible to apply this provision as to unseaworthiness except to the perils dealt with by the sentence in which the provision itself occurs. These words cannot apply to the damage arising from stowage mentioned under

the first head in the clause. So to apply them would be to disregard not merely the punctuation but the whole structure of cl. 2 and the plain meaning of the sentence in which the provision occurs. The words as to unseaworthiness qualify only the provisions under head 3 itself.

In the second place, the exemption from liability for unseaworthiness is not absolute, but subject to the condition that all reasonable means were taken to provide against such unseaworthiness. The appellants have entirely failed to show that this condition was fulfilled; in fact, it is clear that it was not. The provision that the company may entrust to qualified officers the duty of providing against unseaworthiness and shall be thereby deemed to have fulfilled its obligation under the clause has no application to the present case. The company never entrusted to any one the duty of providing 'tween decks for the *Grelwen*; the necessity for providing them was entirely overlooked.

It was urged for the plaintiffs that, even if their case against Elder, Dempster & Co. failed on account of the terms of the bill of lading, they ought to succeed against the owners, Griffiths Lewis Steamship Navigation Company, Ld.

It was said that the master and crew were in the service of this company as owners, and that their conduct in putting an excessive weight on the palm oil barrels amounted to a tort, for which the owners were liable, as having been committed by their servants. The case on which the appellants principally relied on this point was that of *Hayn* v. *Culliford* (1); they laid particular stress on the judgment of Bramwell L.J. in that case.

It appears to me that if the plaintiffs are to succeed it must be upon the bill of lading. The owners of the goods put them on board the *Grelwen* to be carried on the terms of the bill of lading. It is said that the imposition of the weight of the kernels on the top of the palm oil barrels was a wrongful act, resulting in the destruction of the barrels and the loss of the oil, and that for this wrongful act, committed by their servants, the shipowners are liable, apart from contract

(1) 4 C. P. D. 182.

H. L. (E.) 1924

ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co.

GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co.

Viscount Finlay.

altogether, so that the plaintiffs, in claiming from the shipowners, would not be hampered by the conditions of the bill of lading. This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort. The Court of Appeal were, in my opinion, right in rejecting this contention, which would lead to results so extraordinary as those referred to by Scrutton L.J., in his judgment.

I agree with Rowlatt J. and the majority of the Court of Appeal in thinking that the appellants are liable on the ground that the vessel was unseaworthy in being improperly equipped for the service in which she was sent under the charterparty and that the loss resulted from this defective equipment.

LORD DUNEDIN. My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Sumner, which I am just about to read. That opinion expresses so conclusively and fully the result at which I have myself arrived, that I find it unnecessary on my own part to add anything.

LORD SUMNER (read by LORD DUNEDIN). My Lords, this case is now reduced to a question of unseaworthiness. The contract of carriage excepts liability for damage by improper stowage, but, if there was a breach of the implied warranty of seaworthiness, which there is nothing in the contract to limit or to oust, none of the exceptions or limitations contained in

the bill of lading avail to prevent the cargo owner from recovering.

Two things must, therefore, be shown: (1.) that the ship was unseaworthy in the sense of the word established by the decisions, and (2.) that the damage complained of was caused thereby and would not have arisen but for that unseaworthiness. For my part I neither think that the alleged defects in the ship and her equipments amount in law to unseaworthiness, nor that the damage to the puncheons of oil was due to them. No structural defect in the *Grelwen* caused this damage, nor was her equipment defective. In fact, the ship was at all times reasonably fit to load and carry the puncheons, but the puncheons were not able to carry the palm kernels. The casks were as directly and as promptly stove in, as if the Krooboys, who loaded them, had attacked them with crowbars. I think that the ship's design, with her peculiarities and, if you will, her defects, was no more than a causa sine qua non.

The proof of this is easy. It is to be found in the ship's log. The plaintiffs' Sherbro cargo and Konakri cargo, being loaded at separate ports and carried under separate bills of lading, may, for present purposes, be considered as independent adventures. The ship loaded at three anchorages in the Sherbro river, so near together that she was never under way while shifting anchorage for so much as an hour and a half at a time. Once she took the ground for about ninety-five minutes, but she got off under her own steam without damage, and, except for a squall at the Bom-Plake anchorage, she was uniformly fortunate in her weather. She was at all times in sheltered waters, and there is no suggestion of any marine peril that affected her cargo.

In No. 2 hold she took in palm oil at the bottom, afterwards stowing palm kernels in bags above. Before she had left the third anchorage to proceed out of the Sherbro River to sea, she had 3 feet of palm oil in the bilge well of No. 2 hold. As this is the first log entry about the bilges one way or the other, and it is impossible to be sure from the entries when palm kernels first were stowed on the palm-oil puncheons, I cannot

H. L. (E.) 1924 ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co. GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co. Lord Sumner.

tell how short a time had passed before the superincumbent weight crushed the puncheons, but at any rate they were crushed in directly and solely by that weight before the ship could get to sea and their subsequent total collapse was inevitable. Thus it was not in the course of the voyage that the mischief was done, but before ever the voyage began.

The same thing happened at Konakri. Two hundred and twenty-nine casks or barrels of palm oil had already been loaded in No. 3 hold at Sherbro. In less than thirty-six hours from the commencement of further loading of oil in this hold at Konakri the log records 2 feet 8 inches of oil in one bilge in No. 3 hold and 3 feet 5 inches in the other, and this continued with some little variation till the ship went to sea. At the time when the discovery of this amount of leakage is recorded, loading cargo had finished for the day, and not only had enough puncheons been taken in to complete the oil stowed in that hold, but 1095 bags of kernels as well, though whether all of them went into that hold is not quite certain. Deep holds, however, would naturally be proceeded with before shelter deck spaces were filled up. Before the ship left port and shifted to the outer anchorage the oil in No. 3 port bilge had risen to 4 feet 2 inches, though the loading of cargo in that hold had not yet finished. In this state she proceeded to sea in perfectly fine weather. This is an explicit record of bad stowage. After that, whether the ship took a list or not and whether she ran into bad weather or not, the oil cargo was ruined, and such occurrences could make no difference. I will only add that the log makes no mention of what happened in No. 4 hold, the remaining hold containing oil, but, as the ultimate condition was found to be the same on arrival, there is no reason to doubt that the beginning of it was the same also.

A simple calculation will show that the damage caused by the improper stowage can only be remotely connected with the unseaworthiness alleged. The plaintiffs' expert, Captain Cockrill, to whom is due the theory that the ship ought to have had a 'tween deck, original or temporary, in order to

make her fit to take this cargo, gives the following figures. If they cannot be accepted, for other witnesses vary them somewhat, then his whole expert evidence is unworthy of credit. The puncheons are 2 feet 10 inches in diameter. No more than three tiers, he says, should be stowed, and no other cargo should be stowed upon them. Thus we get a maximum safe height of oil casks of 8 feet 6 inches. Now, No. 2 hold is 25 feet deep. In this hold, therefore, dividing its total depth, within reasonable variations, between the upper and the lower space, 'tween decks could not be so laid that there would not remain, either in the upper or the lower hold, 3 to 4 feet of empty space above any oil cargo that could be safely stowed there, for I put aside as fantastic the idea of a lower hold 9 feet deep and a 'tween deck of 16 above it, and the whole evidence assumes that the proper place for oil casks is at the very bottom of the ship. If so, the safety of the oil cargo, even in a ship so equipped, must still depend, and directly depend, on the stowage. If other cargo is put on the casks to fill up the hold, the casks suffer. If the captain does what he ought to have done here and refuses to put an unsafe weight on the oil casks, all is well. In other words the whole difference between damage and safety depends in any case on proper stowage alone, and unseaworthiness, if unseaworthiness there was, at any rate was not the direct cause of the loss.

The respondents argued that the ship was one in which the cargo actually loaded could not be carried in safety, and on this ground they distinguished *The Thorsa* (1), a case not impeached nor, in my opinion, impeachable. There, it was said, the chocolate or the cheese might have been stowed somewhere else; here with the palm kernels this could not be, for the structure of the ship did not permit it. My answer is a short one. The peccant palm kernels need not have been put into the ship at all; they could have been left behind. The only cargo that the plaintiffs are concerned with is the damaged palm oil; they cannot lose their rights, and equally they cannot enlarge them, because

(1) [1916] P. 257.

H. L. (E.) 1924 ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co. GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co. Lord Sumner.

contracts of carriage were made with third parties. The warranty they rely on is a warranty with respect to their own cargo, that at the time when these puncheons were tendered for shipment the *Grelwen* was then fit to receive them, whatever might befall them afterwards, and if that warranty was satisfied they must look for their remedy to some cause of action in damages for what was done to their cargo by the stowage of the cargo of other persons. Whether the palm kernels that did this damage were the plaintiffs' own palm kernels or not they failed to prove. It is not unlikely, but it remains uncertain. As long as a ship was supplied, which was seaworthy for the particular cargo, as to which the warranty of seaworthiness now in question was given, I cannot see how the ship became unseaworthy or how that warranty was broken by things done or omitted to be done under other contracts relating to other cargo. The question on this warranty is one of the ship's fitness for this shipment, not of her fitness for this shipment along with others. It is alike novel and contrary to principle to measure the warranty, which is implied with regard to the palm oil, by reference to other cargo, with which the oil had no connection except that of association under the same deck. The owners of the oil are entitled to have the oil and the kernels properly stowed in relation to each other, but not to have the whole cargo included in one common warranty of seaworthiness.

It must be remembered that the *Grelwen* was chartered to run in a line, loading on the berth as a general ship and calling at various ports to pick up such parcels of country produce as might be available. There is nothing in the charter to bind the shipowners towards the respondents at all. Their contract with the plaintiffs is in the bill of lading, if anywhere. As to the relations between the shippers and the charterers, they were not gone into at the trial, but there is no evidence that, even as between these parties, there was any contract but the bill of lading contract. If the captain had shut out all palm kernels that he could only carry in holds containing oil, there is nothing to show that

the plaintiffs could have objected, and, apart from a point to be mentioned presently with regard to the plaintiffs' own consignments of palm kernels, he was contractually free to do whatever was right in the interests of the palm oil, even to the extent of sailing with holds Nos. 2, 3 and 4 half empty. The plaintiffs' real case is, in my opinion, that he ought to have done so.

It was, however, contended for the respondents that, so far from the case being one of bad stowage, the captain had no choice but to stow the cargo as he did; that he only performed his duty in the arrangements which were adopted; and that improper stowage is a complete misnomer. With all respect, I think that this argument is a mere paradox and rests on a complete misapprehension both of the evidence and of the captain's duty.

The captain's evidence is that at Sherbro the charterers' shore agent came on board and "told him what to load." The ship's mate, however, was in charge of the loading itself. On this slender statement, which was not further developed or even put to the shore agent when he gave evidence, it is said that the captain had no choice in the matter and that, as the total cargo could not have been so stowed as to prevent some such damage as occurred, it follows that the ship was not fit to receive and carry her cargo and this palm oil as part of it, but was unseaworthy from the outset.

My Lords, how can the captain's duty to stow the whole cargo and every parcel of it properly—a duty owed alike to the shippers of cargo and to the owners of the ship—be affected by the mode in which the charterers choose to carry on their business of procuring cargo? If they arrange to have certain parcels of local produce lifted by a particular vessel and it turns out that the captain cannot take them all without improperly stowing some of them, how does that turn his improper stowage, when he nevertheless does take them, into something else, which is not improper? Again, if the charterers require him to load an aggregate cargo, for which his ship is not fit, how does that prevent her from being fit for a several parcel, whose owners make no demand

H. L. (E.) 1924

ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co. GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co.

Lord Sumner.

or contract at all as to the carriage of the deleterious parcels along with it ?

The charterers' rights depend on the time charter, whose provisions were but little examined at your Lordships' bar. It seems to have been assumed that the captain was bound under the charter to receive and stow the cargo actually tendered to him on behalf of the various consignors, and that on behalf of his owners he had an interest in accepting and stowing it all, whether it could be properly stowed or not. This is not so. The charter is a time charter ; the hire is a fixed sum per month. The captain could not increase that hire by accepting more cargo than he could safely stow ; he could only impose liability on his owners under bills of lading signed on their behalf and this without any corresponding advantage to them. Nothing in the charter requires him to take cargo irrespective of his ability to stow it properly, nor is there anything in it to relieve him from his responsibility for seeing to the stowage of his own ship. No doubt it might be a somewhat difficult problem for him to estimate exactly what weight of palm kernels the oil puncheons would bear, but that is the kind of difficulty a captain is expected to solve. It is his business to keep on the safe side. Nothing in the charter at any rate operates to relieve him from this duty or to transfer its effects to the ship herself, merely because she is not so built that errors in stowing cannot do anybody any harm. Even if the captain's conduct was excusable in him, the stowage remains improper, for it does not depend on his difficulties but on the cargo's safety.

The respondents further attempted to found an argument on the accident, that several kinds of cargo shipped by the plaintiffs were included at each loading port in a single bill of lading. Nothing really comes of this ; the point is a fallacy. For convenience—presumably because the plaintiffs did not contemplate selling any of their cargo while on passage for delivery ex ship at destination—only one bill of lading was signed at each port, but there is nothing in it to make all the goods named in it one composite consignment to be stowed together. No such contention was gone into at the trial.

No such contract is likely in business. The oil and the palm kernels seem to have come aboard at random and quite independently of one another. The mate's receipts for the palm oil at each port of shipment are given without reference to any other cargo. One bill of lading includes goatskins, and the other bags of cocoa, which no one suggests are commodities that could or would be stowed or carried with oil casks as parts of a joint parcel. Any warranty with regard to the oil is a warranty arising out of the shipment of the oil —for the bill of lading itself is only evidence of the contract of carriage—and does not arise also out of the subsequent shipment of the superincumbent kernels. In fact the Sherbro cargo was loaded in the so-called Sherbro River, while the bill of lading was only signed subsequently at Sierra Leone, and the obligations as to the stowage and carriage of the oil are not complicated or affected by the distinct though parallel obligations as to the kernels. Of course, if the damage was done by a third party's palm kernels, as is quite possible and is left open on the evidence, no question of any warranty but that implied in favour of the plaintiffs can arise at all.

My Lords, I turn to the question whether the plaintiffs really proved their allegations against the ship. This is a matter on which your Lordships are not in the least concluded by the findings below, and the question is too serious to be disposed of by mere acquiescence in the views of the trial judge.

What was the proof? A retired master mariner, who had never had experience of the carriage of palm oil in such a ship as the *Grelwen*, said that "there ought to have been some erection to keep the weight off the casks"—a thing which he admitted he had never seen in practice nor was he able to describe it. Another, whose experience had been in the Ceylon trade, was asked and was allowed to give his opinion on the question, whether the *Grelwen* was seaworthy, though this was the question for the judge and was not a proper question for the witness. He answered that she was not seaworthy, being unsuitable owing to her great depth of hold, and that there should have been a temporary deck,

H. L. (E.) 1921 — ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co. — GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co. — Lord Sumner.

though he did not pretend that he had ever seen such a thing in such a ship and candidly volunteered that the Ceylon trade, which alone he knew, was not comparable with the African palm oil trade. The witness who really counted with the trial judge was Captain Cockrill, a cargo surveyor of experience. It is his case that has in truth been developed by the plaintiffs. He says that the ship ought to have had a temporary 'tween deck built, by bolting to the frames pieces of scantling from frame to frame, then resting thwartship beams from side to side of the ship on this scantling and laying 'tween deck planking fore and aft on these beams. He, too, told the judge how to decide the case by saying that the *Grelwen* was unseaworthy.

When this suggestion came to be tested in cross-examination, Captain Cockrill admitted that he had never seen such a temporary 'tween deck fitted for a voyage with palm oil, but that he had seen it in a single Greek ship laden with onions, not alleged to be an Isherwood ship, and in Adriatic ships carrying candied peel. He further vouched the direction of the Board of Underwriters of New York with regard to the carriage of petroleum in casks from the United States, but, on being pressed, he explained that apart from its being a totally different voyage and trade, the petroleum casks were only one-third of the size of the palm oil casks, and the actual wording of the directions was that ships built with 'tween deck beams should lay a 'tween deck on the beams fore and aft. Now the *Grelwen* is built without such beams. In effect he contended that palm oil puncheons ought not to be crushed under weights which they cannot bear, and therefore that the ships which carry them had better have 'tween decks and had better not have deep holds. What he had to say was not evidence of what is ever done or is feasible in such a case as this. It was an expert argument as to the possibility of preventing what happened here on grounds consistent with unseaworthiness and not merely with bad stowage.

How much of this did the learned judge accept? He totally disregarded the suggestions of the plaintiffs' witnesses,

that the effect of what was done was to endanger ship and cargo by causing risk of heavy list or blocked suctions. He said that a ship without 'tween decks and with a 25-foot hold was not, as a ship, properly equipped for the carriage of palm oil, a fault "going to the hold of the ship and not to stowage as stowage"; that she could have been made fit by erecting something to keep the weight of the superincumbent cargo off the bilges of the barrels, but out on the coast there were not the means to do this, and the ship had not brought with her the appliances or equipment necessary for the purpose. I think it is plain that the case made before Rowlatt J. did not lay stress on the theory now relied on—namely, that the ship should have been provided, under the name of "equipment," with the means of reconstructing her holds, in case enough palm-kernels should be tendered to make this desirable in the interests of a full cargo. He says (Record, p. 87) to the witness Mr. Camps, "it is like putting a grid round your case," and (Record, p. 18) in his judgment, "it could have been made proper for the stowage of such a cargo by the erection of what has been called a temporary 'tween deck or a platform, by the erection of something, to use perfectly plain and popular language, which would tend to keep the weight of the superincumbent cargo off the bilges on the barrels"—a view of temporary 'tween decks very far indeed from Captain Cockrill's plan. With this view the majority of the members of the Court of Appeal agreed. This is not a finding that the ship and her holds were not fit to carry the oil. It is a finding, at most, that, if the captain was so ill advised as to overload the casks of oil, the deep holds gave him the chance of doing so. I think that in effect the decisions in both Courts come to this. If the ship had been built on a different plan, if instead of being designed to have deep unobstructed holds she had been provided with 'tween decks or the means of erecting a substitute for 'tween decks, the oil casks would not have been crushed; but what is this except saying that if the ship had been so designed that those in charge of the stowage could not commit the

H. L. (E.) 1924

ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co.

GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co.

Lord Sumner.

particular blunder, which they did commit in stowing her, then this cargo would not have been damaged, at any rate in the particular way in which it was damaged? Of course, a ship perfectly fit to carry one cargo may be unfit to carry another and so be unseaworthy in that connection, but a ship does not become unseaworthy merely because her construction or appliances are not foolproof or because she does not carry about the world contrivances for preventing by anticipation the consequences of any want of care or skill, of which those in charge of the cargo may be guilty. If a captain, having a perfectly good hold at his disposal, puts cargo into it in the wrong way, or puts more cargo into it than is consistent with the safety of individual packages, the result is not that he makes his ship unseaworthy, but that he proves himself to be an incompetent officer. One result of improper stowage is that damage will result thereby, and the cargo will be discharged at its destination more or less injured during the voyage, but such a loss is not caused by unseaworthiness merely because it happens during the voyage. It is the direct result of bad stowage, even though in a different ship that particular error in stowing could not have been committed.

My Lords, we are not now concerned with any question of the right to make a ship seaworthy for her service in stages, nor is there any suggestion here, as there was in *Cohn* v. *Davidson* (1), that, during or after the loading and before sailing, the ship sustained any damage, which rendered her unseaworthy before proceeding to sea, though she had been seaworthy previously. Such as she was when she loaded the oil, such she was also when she put to sea, and the whole case turns on the ship's original design and construction, and on the absence of any "equipment" or endeavour to fit her with 'tween decks pro hac vice. It appears to me to have been decided, that, even in the case of something which is a defect in the ship herself, structural or accidental, sufficient to render the ship unseaworthy if not properly handled or adjusted, though I can find no such defect here, it would be an answer to

(1) 2 Q. B. D. 455.

an allegation of unseaworthiness to show that, in the ordinary course of proper management, the ship so constructed, or the appliance so adjusted, will be restricted to its proper uses and prevented from being a source of danger. The reasoning of your Lordships' House in *The Schwan* (1) shows that, assuming the three-way cock to have been an unfit contrivance in itself, the ship would nevertheless have been seaworthy, if those in charge could in the ordinary course have seen its risks and known how to meet them. "The position is this," says Lord Gorell: "the vessel was not reasonably fit to carry the cargo in the circumstances, for the cock in question was of an unusual, improper, and dangerous character, and those who had to use it on the voyage had no reason to suspect this, though if they had known the truth they could have adjusted the cock so as to prevent any risk of water getting to the cargo." The latter part of this sentence is irrelevant, if the construction of the cock itself was sufficient to make the ship unseaworthy. So in *Steel* v. *State Line Steamship Co.* (2) the porthole, which was designed to be opened or shut as occasion might require, only became an element of unseaworthiness because the cargo had been so stowed that it remained loose during the voyage, since it could not be got at and fastened. There was no improper stowage of the cargo as cargo, but there was an obstruction to a part of the ship's appliances affecting the proper working of it as part of the ship, and so the ship sailed with an open hole in her side, that could not be closed. If the porthole had continued to be accessible, but had been left open by the carelessness of those responsible for shutting it, the ship would not have been unseaworthy, but the officers or crew would have been careless. To load bullion on a ship, which has no efficient strong room, or passengers' luggage in a ship which has nothing but a water-closet to put it into, is not mere bad stowage, if it is bad stowage at all; it is accepting goods for carriage in a ship that has no fit place to put any of them in at all. No case has been cited in which unseaworthiness has been held to arise without the ship or some part of her being affected so as

(1) [1909] A. C. 450, 463. (2) 3 App. Cas. 72.

H. L. (E.) 1924 ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co. GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co.

Lord Sumner.

to make her less than fit for her purpose, and I accept the great authority in these matters of Scrutton L.J. for the statement that the respondents' argument goes beyond any of the decided cases and beyond the principles of the law as to unseaworthiness and produces results in connection with unexceptionable vessels, which are almost absurd. I can see no analogy between the separation cloths, dunnage mats or temporary bulkheads (mere perpendicular partitions constructed of planks), which are mentioned in *Hogarth* v. *Walker* (1), and the elaborate structural alteration of this ship, which the respondents postulate.

Nearly twenty years ago the Court of Appeal held, affirming Channell J., that a ship is not unseaworthy where the mode in which the cargo is stowed practically puts the ventilation system out of action on the voyage, whereby for want of ventilation other cargo is damaged. In that case the cause of action is for bad stowage: (*Bond, Connolly & Co.* v. *Federal Steam Navigation Co.* (2)), and Sir Gorell Barnes P. treated the case for unseaworthiness as unarguable. If that case stands —and it has not been challenged—the present case must à fortiori be one of improper stowage only, for here no part of the ship or her appliances was obstructed or affected at all. She was simply the good ship that she was designed to be. There must have been a point in the loading at which the weight borne by the puncheons changed from an amount that they could carry to an amount that they could not. It seems to me to be a mere paradox to say that beyond that point the ship, theretofore seaworthy in every sense, became on a sudden unseaworthy in respect of all the oil already loaded, as well as for any loaded thereafter, and became unseaworthy retrospectively, though nothing changed except the admission of further cargo. If this ship had sailed as soon as the oil puncheons were on board, her fitness to load and carry the cargo could not have been impugned. Even as it was, when she sailed, she and all her appliances were exactly the same, structurally and functionally, as they

(1) [1899] 2 Q. B. 401; [1900] 2 Q. B. 283.

(2) 21 Times L. R. 438; 22 Time L. R. 685.

would have been in that case, and all attempts to show that in her actual condition she and her cargo were exposed to accidents or perils of the sea to any different or greater extent than if she had had 'tween decks, broke down completely on the evidence.

The distinction between unseaworthiness of the ship and improper stowage is very plainly stated in *Wade* v. *Cockerline* (1) by Kennedy J., whose judgment was affirmed in the Court of Appeal. "I could not give a case," he says, "in which the immediate cause included in the exceptions . . . . could be better exemplified than by what happened in this case. The ship was perfectly seaworthy, to be loaded with the cargo upon deck. She did not become an unseaworthy ship, but an accident was produced on board. I suppose that immediately before the accident she could not safely take in any more wood cargo on deck, but she was safe up to that moment. With a little care, up to the moment at which the accident happened, the defect in stowage might, and, if the stevedores had given heed to the warnings of the officers, would, have been set right. . . . . I do not see how unseaworthiness of this vessel at any time can properly be alleged. . . . . The ship, as a ship, never was unseaworthy to receive the cargo." Adapting this language to the present case, I say "She did not become an unseaworthy ship, but improper stowage was produced on board."

Unseaworthiness is a quality of the ship, however arising. A warranty of seaworthiness means that the ship is reasonably "fit to meet and undergo the perils of the seas and other incidental risks to which she must of necessity be exposed in the course of the voyage," to quote Lord Tenterden's language, adopted in *Kopitoff* v. *Wilson*. (2) True this refers to the laden ship and to her fitness with her cargo to undergo these perils, but her cargo is to be considered distributively, and unfitness with regard to one parcel is not necessarily involved in unfitness as to all. Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage, which affects nothing but the cargo damaged

(1) 10 Com. Cas. 47, 51, 115. (2) 1 Q. B. D. 380, 381.

H. L. (E.) 1924 ELDER, DEMPSTER & Co. v. PATERSON, ZOCHONIS & Co. GRIFFITHS LEWIS STEAM NAVIGATION Co. v. PATERSON, ZOCHONIS & Co. Lord Sumner.

by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo.

There is a sense, but I think one sense only, in which the *Grelwen* might be said to have been unfit for the carriage of this cargo. One must distinguish between general fitness for what the nature of the trade requires and fitness to receive and carry a particular cargo or part of a cargo, tendered in the course of that trade. A ship, which in a certain trade and in certain not improbable combinations of cargo offering in the trade, has to shut out cargo and to sail less than a full ship, because if she takes the cargo offered she will thereby damage other cargo already loaded, is pro tanto an unprofitable ship. She is not as good a freight earner as she might be. For the cargo, however, that she does carry, without sacrificing it to enable her owners to carry more cargo and so earn more freight, she is prefectly fitted and quite seaworthy. All that can be said is that she might have paid better in another trade, or that another ship differently built might have paid better in the same trade. The *Grelwen* was not structurally unfitted for the West African trade, nor is that the question; but it may be that ships of another design might do better than she could. The circumstance, so much harped upon, that all Elder, Dempster & Co.'s own ships had 'tween decks is really accidental. Being better suited to the trade, they were more able to load full cargoes, however made up, but the point is not that they can carry palm-oil better than the *Grelwen*, but that they can carry palm kernels too. So far as I can see, if an entire cargo of palm kernels be assumed, the *Grelwen* is better fitted for its carriage than a 'tween deck ship would be, for, with her unencumbered holds and absence of 'tween decks to occupy cargo space, she can carry more palm kernels than a ship of the same deadweight capacity, equipped with 'tween decks. Really that is all.

Beyond all doubt, my Lords, the plaintiffs, the owners of the oil cargo, have been very badly used, and, as the oil was carried on terms which relieved the defendants from liability for bad stowage and only make them liable if the plaintiffs

can show the ship to have been unseaworthy, I am very sensible of the temptation to do substantial justice by accepting a finding of unseaworthiness. The consequences of such a finding are, however, grave, since unseaworthiness affects not merely the contracts of carriage but the contracts of insurance. The unseaworthiness alleged consists in this, that a ship, unimpeached in herself, built to have holds unencumbered by transverse 'tween deck beams, is unfit to engage in the ordinary carrying trade of the West African coast, unless, in some mode or other, she is fitted with 'tween decks and so made structurally other than what she was designed and built to be. Accordingly I have thought it right to resist the impulse to take the injured plaintiffs' part and have ventured to examine the facts closely, lest I should arrive at a conclusion that would be seriously inconsistent with the way in which this class of ship is and necessarily must be employed in commerce. Ships built under the Isherwood patents are a numerous and, so far as I know, an accepted type of ship, and in their freedom from 'tween decks and 'tween deck beams, they have an advantage for carrying larger cargoes, which is part of their design. I shrink, as Scrutton L.J. shrank, from saying on this evidence, that in the ordinary West African trade such a ship is an unseaworthy ship by reason of her construction and design. If the question had not been encumbered with the technicalities and refinements of modern bills of lading, it would not have occurred to any one acquainted with practical shipping to affirm that this ship was unseaworthy, or to dispute that her cargo was improperly stowed. I could have understood that it might be argued, perhaps paradoxically, that the ship was not reasonably fit to load and carry this oil, because she was in charge of a captain and mate who were without experience of such a cargo and knew their business no better than to overload the puncheons till they inevitably collapsed, but the argument, which actually has been advanced, is, I think, one which begins and ends with the circumstance that improper stowage is here the subject of an exception, unless the ship was what is called unseaworthy, whereby the loss occurred.

H. L. (E.) 1924

ELDER, DEMPSTER & CO. v. PATERSON, ZOCHONIS & CO.

GRIFFITHS LEWIS STEAM NAVIGATION CO. v. PATERSON, ZOCHONIS & CO.

Lord Sumner.

There was, finally, an argument that the shipowners might be liable in tort, or at any rate, as bailees quasi ex contractu, though the charterers and their agents were not. This fails, to my mind. *Hayn* v. *Culliford* (1) was the authority on which the respondents contended that the shipowners were responsible for misfeasance, consisting in bad stowage, even though they were strangers to the contract of carriage. That case has little resemblance to such a case as this. There, Denman J. found that the defendants were, in fact, parties to the bill of lading and, as the evidence supported that finding, the observations of the Court of Appeal as to an alternative cause of action in tort were obiter. Of the various reports of the case, that in 40 L. T. 536 alone states the arguments of counsel, and from it Bramwell L.J. appears to have treated the case as analogous to *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (2), where the only question was one of the right of a servant, whose master bought his ticket, to claim for the destruction of his own luggage. There is thus no connection between *Hayn* v. *Culliford* (1) and the present case, where the *Grelwen* was temporarily placed in a well-known line, trading under a well-known form of bill of lading. Further, so far as I know, *Hayn* v. *Culliford* (1) is now regarded as an authority in ordinary shipping cases only upon the question of the meaning of "negligence in navigation" or other similar expressions. It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the Elder, Dempster & Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognizes the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely

(1) 4 C. P. D. 182. (2) (1851) 21 L. J. (C. P.) 34.

independent of contract, as would be necessary to support the contention.

My Lords, I think the appeal ought to be allowed with costs here and below, and that judgment should be entered for the defendants.

LORD CARSON. My Lords, I agree that this appeal should be allowed, and I have nothing to add to the judgments of my noble and learned friends Lord Cave and Lord Sumner, with which I agree.

An order in similar terms was made on each appeal.

Order of the Court of Appeal reversed, and action dismissed. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House.

Lords' Journals, March 18, 1924.

Solicitors for the appellants in the first appeal: *Lawrence Jones & Co.*

Solicitors for the appellants in the second appeal: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

Solicitors for the respondents: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.)* 1924 *March* 18.

CHRISTOFORIDES . . . . . APPELLANT;

AND

TERRY . . . . . RESPONDENT.

Principal and Agent—Indemnity—Broker employed to buy Cotton—Failure of Principal to remit Funds against Indebtedness—Closing Account—Sale by Broker and simultaneous Resale to Broker.

The appellant employed a broker to make speculative purchases of cotton for him, and became heavily indebted to him owing to the fall of prices in the cotton market. The broker, as he was entitled to do by the terms of his agency, closed the account by selling the cotton which he had bought for the appellant. He sold (inter alia) two lots of foreign cotton to different jobbers at the respective market prices of the day and immediately bought back from the same jobbers at the same prices equivalent amounts of cotton of the same description. The broker having assigned his property for the benefit of his creditors, the respondent, as trustee of the deed of assignment, sued the appellant to enforce the broker's claim to be indemnified. The trial judge found that there was a real sale and a real purchase of the cottons in question, and the Court of Appeal accepted this finding:—

Held, that the simultaneous resale to the broker did not vitiate the sale by the broker and that the account was effectually closed.

Macoun v. *Erskine, Oxenford & Co.* [1901] 2 K. B. 493 and *Erskine, Oxenford & Co.* v. *Sachs* [1901] 2 K. B. 504 applied.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal affirming a judgment of Sankey J.

The following statement of facts is taken from the opinion of Viscount Cave:—

"In the months of October and November, 1920, the appellant, Mr. John Christoforides, engaged in a series of speculative purchases of cotton, employing as his broker Mr. F. N. Thomson (trading under the style of J. & B. Thomson & Co.) on the terms that there should be a 'mutual call' of 1000*l.*, that is to say, that if at any time the indebtedness of either party to the other should exceed 1000*l.*, the party in credit should be at liberty to call upon the party indebted for payment of that sum. In the month

* *Present:* VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER, and LORD CARSON.

of November, 1920, the market having gone against the appellant and his account being in debit to a large amount, the broker required him to make good the deficiency, and on his failure to do so became entitled (as is now admitted) to close the account and sell the cotton bought on his behalf. The broker accordingly closed the account on December 2, 1920, and called upon the appellant to indemnify him against the loss. This the appellant failed to do. The broker having afterwards got into difficulties and assigned his property for the benefit of his creditors, this action to enforce the claim for indemnity was brought by the respondent as the trustee of the deed of assignment.

At the trial of the action by Sankey J. several defences were raised; but the controversy between the parties is now confined to two items in the broker's account—namely, (1.) a claim in respect of 100 bales of Egyptian cotton, and (2.) a claim in respect of 1200 bales of American cotton, both lots having been bought on behalf of the appellant for delivery at Liverpool in January, 1921. In the account delivered by Thomson to the appellant of the sales effected on December 2, the 100 bales of Egyptian cotton were entered as sold at 19·75*d.* per lb., and the 1200 bales of American cotton as sold at 11·39*d.* per lb.; but in the course of the proceedings it was ascertained that, while the contract notes and contract book showed sales to jobbers at those prices, the contract book also showed simultaneous purchases by Thomson of the same quantities of cotton from the same jobbers at the same prices, these purchases being entered as made on behalf of 'John Shaw,' a fictitious name which Thomson was in the habit of using to cover his own speculative dealings in cotton. Upon this it was contended on behalf of the appellant that the sales alleged to have been made on his behalf of the 100 bales and the 1200 bales were fictitious and non-existent, and accordingly that as regards these items the broker had never properly closed the account against him, and had not become entitled to his indemnity.

"Sankey J., after hearing the evidence of Thomson and others, found this issue in favour of the respondent. He

H. L. (E.) 1924 CHRISTOFORIDES v. TERRY.

said: 'I accept Mr. Thomson's evidence with regard to the Liverpool contracts. I think they were honest contracts, and I think he did not make any secret profit. I think that he was entitled to close, as I have already found, and having closed properly legally and honestly I think he was entitled to buy under the circumstances. One has to look very carefully at it. I agree with Mr. Doughty that it is a thing of great suspicion, but I am not prepared to say that these were dummy or sham contracts or that the Liverpool sales were not sales which Mr. Thomson was entitled to effect as and when he did.' He accordingly gave judgment against the appellant for 6385*l.* 13*s.* 1*d.*

"Upon an appeal to the Court of Appeal the point was again raised, but that Court, after a careful consideration of the documentary and other evidence, came to the same conclusion as Sankey J., namely, that there had been a bona fide sale of the 100 bales and the 1200 bales of cotton and a bona fide purchase of equivalent amounts on Thomson's behalf. But in the course of the argument before the Court of Appeal it was pointed out that it appeared by the contract book that on December 2, 1920, the day of the closing of the appellant's account, Thomson had sold on his own behalf, 100 bales of Egyptian cotton at prices which realised 50*l.* more than the amount which he paid for the same amount of cotton later in the day; and thereupon the respondent's counsel in order to avoid controversy consented to credit the appellant with this profit of 50*l.* The amount of the judgment was accordingly reduced by 50*l.*, but subject to this reduction the appeal was dismissed. Thereupon the present appeal was brought."

1924. Feb. 22, 25, 26. *Doughty* and *De Reya* for the appellant. The appellant submits that in the circumstances the whole of these transactions, whether good or bad, should be set aside, and that consequently the respondent is not entitled to any indemnity. It is the policy of the law wherever a fiduciary relationship exists, such as that of broker and client, to insist that the person in whom the confidence is

reposed shall not place himself in a position which may be or become inconsistent with the interest of the person who has reposed the confidence, and on this principle it has been decided that a broker may not buy his client's securities from him or sell his own securities to his client unless the consent of the client is obtained after full disclosure. This is an inflexible rule, and it matters not that the client by the action of the broker has suffered no loss or that the bargain has been made at the market price or even at a price more advantageous to the client. The broker must have no personal interest in his client's bargain, and if he has departed from this rule he will not be entitled to claim to be indemnified in respect of the bargain: *Rothschild* v. *Brookman* (1); *Ex parte Lacey* (2); *Ex parte James* (3); *Bentley* v. *Craven* (4); *Hamilton* v. *Young* (5); *Duncan* v. *Hill* (6); *Ellis* v. *Pond.* (7) The last-named case is directly in point, except that the default was different; but the quality of the default does not matter. An agent who seeks an indemnity for losses incurred in the course of transacting the business of his agency must show that the losses were incurred without his own default and that he was acting in all respects within his authority. Story on Agency, § 339. *Macoun* v. *Erskine, Oxenford & Co.* (8); and *Erskine, Oxenford & Co.* v. *Sachs* (9), if and so far as they conflict with the principle above stated, were, it is submitted, wrongly decided. In the present case Scrutton and Atkin L.JJ. proceeded solely on the view that the Court was bound by those two decisions, and Scrutton L.J. intimated a doubt as to their correctness. *Walter and Gould* v. *King* (10) is distinguishable, because there the whole transaction was fair and proper, and that case is really an authority on the duty of the broker to minimise the loss as far as possible.

Greaves-Lord K.C. (with him *Noel Goldie*) for the respondent. As between broker and principal, where there is a breach of

(1) (1831) 5 Bli. N. S. 165
(2) (1802) 6 Ves. 625.
(3) (1803) 8 Ves. 337, 345.
(4) (1853) 18 Beav. 75.
(5) (1881) 7 L. R. Ir. 289.
(6) (1873) L. R. 8 Ex. 242.
(7) [1898] 1 Q. B. 426, 439–441.
(8) [1901] 2 K. B. 493.
(9) [1901] 2 K. B. 504.
(10) (1897) 13 Times L. R. 270.

H. L. (E.) 1924 CHRISTOFORIDES v. TERRY.

the contract by either party, the other party can elect to treat the breach as bringing the contract to an end, but then it is his duty to minimise the loss. By the terms of this contract of agency the broker was justified in closing the account, after due notice, when the appellant failed to remit funds against his indebtedness. Each of the transactions entered into by the brokers with the appellant was a separate and distinct transaction, and the fact that he made a secret profit on certain transactions does not deprive him of his right to an indemnity in respect of those transactions on which no secret profit was made. It has been found by both the Courts below that the sales now in question were genuine sales and, that being so, they are not vitiated by the repurchase of the cotton from the same jobbers. [He cited *Hogan* v. *Shaw* (1) and *In re Finlay* (2).]

Doughty replied.

The House took time for consideration.

1924. March 18. VISCOUNT CAVE (read by LORD DUNEDIN) [after stating the facts:] My Lords, it appears to me that the first question to be considered is one of fact—namely, whether there was on December 2 a real sale by Thomson of the two lots of cotton at the proper market prices and a real purchase by Thomson of equivalent amounts on his own behalf, or whether the whole transaction was a sham and a pretence. Upon this question it appears to me that the finding of the learned trial judge, affirmed as it was by the Court of Appeal, is conclusive. He found that the contracts of sale and purchase were honest and bona fide transactions and not a sham. However suspicious the circumstances appear at first sight to be—and as against Thomson there was grave reason for suspicion—it is impossible to say that there was no evidence upon which the learned judge could come to his conclusion, and I do not see how that conclusion can now be disturbed.

But it is argued that, however that may be, the result of

(1) (1889) 5 Times L. R. 613 (2) [1913] 1 Ch. 565.

the transactions of sale and purchase taken together was that Thomson became the purchaser of the appellant's cotton, and that under the well-known equitable rule which forbids an agent for sale to become himself the purchaser, the transactions were invalid and may be treated by the appellant as a nullity. This argument appears to me to be founded on a misconception. The appellant had no cotton, but only contracts which entitled him on payment of certain sums on the due days to have certain quantities of cotton delivered to him in the future. He failed to perform his contract, and the broker (who, of course, was personally liable to the jobbers under the contracts) paid the amounts due and became entitled, in order to protect himself against further loss, to close the account by sales of equivalent amounts of cotton. This he did, and so ascertained and crystallized his right to indemnity; and he did not lose that right by reason of the fact that he at the same time entered into bona fide contracts for the purchase of like quantities of cotton on his own account. No doubt, if he had sold the cotton at an under value, he would have been liable in damages; and if he had abused his position as the appellant's broker in order to get a profitable bargain for himself, he could have been called upon by virtue of his fiduciary position to account to the appellant for any profits that he may make. But no undervalue was alleged or proved; and he made no profit other than the 50*l.*, which has already been credited in his account. Indeed, the purchase by Thomson of 1200 bales of American cotton resulted in no profit but a heavy loss, which, if there had been no sale on December 2, would have fallen upon the appellant. In the circumstances it appears to me that the appellant is not entitled to repudiate the sales or to escape altogether from his liability under his contracts for purchase.

As to the cases cited, *Duncan* v. *Hill* (1) and *Ellis* v. *Pond* (2) have no application, as there was no illegal sale. But *Macoun* v. *Erskine, Oxenford & Co.* (3) and *Erskine*,

(1) L. R. 8 Ex. 242. (2) [1898] 1 Q. B. 426.
(3) [1901] 2 K. B. 493.

H. L. (E.) 1924

CHRISTOFORIDES v. TERRY.

Oxenford & Co. v. *Sachs* (1) are directly in point, and I see no reason for questioning those decisions.

For the above reasons I am of opinion that this appeal fails and should be dismissed with costs.

VISCOUNT FINLAY. My Lords, the plaintiff in this case (Terry) is the trustee under a deed of arrangement of F. N. Thomson, who carried on business under the style of J. B. Thomson & Co. as cotton brokers in Liverpool and in London. J. B. Thomson & Co. acted as cotton brokers for the appellant in a series of speculative purchases of cotton at New York and in Liverpool.

It has been found in the Courts below, and I accept this finding as correct, that on December 2, 1920, there was a balance against the appellant on his account with Thomson, and Thomson was entitled to close the account by selling against him. The action was brought to recover the amount of the deficiency on this closing of the account. Various defences were suggested, but the case now turns upon one point, and one point only, and that is, whether the sales which J. B. Thomson & Co. carried out were valid for the purpose of closing the account. It is not in dispute that if they were valid for this purpose a balance of upwards of 6883*l.* is due to Terry as the assignee of J. B. Thomson & Co.'s estate.

There were two transactions in respect of which these sales were effected to which it is necessary to refer. The first was in respect of 1200 bales of American cotton, and the second in respect of 100 bales of Egyptian cotton. As to the American cotton, Thomson sold to Alexander Eccles & Co. at the price of 11·39*d.*, and at the same time bought it from them at the same price. As to the Egyptian cotton, in like manner Thomson sold to Laredo & Co. at 19·75*d.*, and they resold an equivalent amount of cotton to him at the same price. The sales and repurchases were all effected on the same day, December 2.

I shall assume for the purposes of my judgment that the sale and the resale in each case formed part of one transaction,

(1) [1901] 2 K. B. 504.

by which it was intended that Thomson should become the purchaser of the American and the Egyptian cottons respectively. The sale to Eccles and the sale to Laredo were real sales in the sense that the right to the cotton contract vested in them as purchasers, though only for a moment. From the first it was meant that the right to the cotton should be passed on to Thomson by virtue of the contracts of resale at the same price. It would be mere trifling to treat the resale to Thomson in each case as if it were an independent transaction. I agree with the appellant in his view of the facts of this part of the case, but I do not agree with him as to his conclusion of law on these facts.

For some reason which has never been adequately explained the repurchase was not entered in Thomson's books as being by Thomson himself, as it in fact was, but as being by "John Shaw," a name which Thomson seems to have been in the habit of using in all cases when it was desirable for any reason to conceal his identity.

I regret that I am not able to concur with Sankey J. in thinking that this was a proper transaction on the part of Thomson. He was broker for Christoforides, and in closing his account he should have sold on the market in the ordinary way, without any arrangement for repurchase by himself. What he was not at liberty to do directly he was not at liberty to do indirectly by means of a sale with an arrangement for immediate repurchase by him. But the question, and the only question, with which we are concerned on this appeal is whether this impropriety in the repurchase (the second stage of the transaction) prevents the sales to Eccles and to Laredo from effectually closing the accounts between Thomson and Christoforides. Bankes L.J. points out (Appendix, pp. 100, 101) that Christoforides had two possible remedies, and refers to the cases of *Macoun* v. *Erskine, Oxenford & Co.* (1) and *Erskine, Oxenford & Co.* v. *Sachs* (2), in both of which cases *Walter & Gould* v. *King* (3) is cited. The Lord Justice goes on to say: "Now the next point was

(1) [1901] 2 K. B. 493. (2) [1901] 2 K. B. 504.
(3) 13 Times L. R. 270.

H. L. (E.) 1924 CHRISTOFORIDES v. TERRY. Viscount Finlay.

this: Assuming that Thomson had the right to close the contract, the defendant through Mr. Doughty makes great complaint of the way in which he did it, and Mr. Doughty's contention as I understand it is that, not having sold to some independent purchaser, and when I say independent purchaser I mean some purchaser who was quite independent of Thomson and from whom Thomson did not repurchase, he was entitled to disregard the sale altogether and to set up that Thomson had exceeded his authority and was therefore no longer entitled to claim the indemnity to which an agent who acts within his authority is entitled. Now there has been a good deal of authority on that point and I am not going through all the cases, but the last cases I think establish the principle quite clearly—the case of *Macoun* v. *Erskine, Oxenford & Co.* (1), and the case of *Erskine, Oxenford & Co.* v. *Sachs.* (2) In both the facts I think are very similar, at any rate to this extent, that those were cases where the broker had been employed to purchase shares for a client and, circumstances having arisen which entitled the broker to close the account, what he did was: he went to the jobber in the market to make a price for the shares and, the jobber making a fair market price, a bargain was made by the defendant with the jobber for the sale of the shares to him at the price fixed and for the repurchase of the shares by him from the jobber for the next account. Now that transaction was complained of as being a breach of the broker's duty, because in substance he was buying his own client's shares. In both cases it was held that the broker had a right to close the transactions and, although of course he had no right to buy himself, the client could not complain except in one of two forms; either that the broker had made a profit for himself out of the transaction, in which case he would have to account for it, or that the shares had not been sold at the market price, in which case he might be liable for damages. That is how I understand the law stands with regard to a case where an agent has made an actual sale of the commodity and has then rebought it from the purchaser, and therefore, if the facts in

(1) [1901] 2 K. B. 493. (2) [1901] 2 K. B. 504.

this case were that with regard to these two particular lots of cotton Thomson had really sold to a real purchaser, but with an arrangement either made at the same time or shortly afterwards that he would repurchase them from him, yet, as it was a genuine transaction in the sense that it was not merely a book entry or a sham, the defendant would not be entitled to refuse to indemnify the broker merely on that ground." Scrutton and Atkin L.JJ. rested their decisions simply on the ground that these two cases in 1901 were binding upon them. Scrutton L.J., however, appears to intimate that he would have had some doubt upon the point if it had been open to him upon the authorities.

This House is of course not bound by these decisions of the Court of Appeal, and it becomes necessary to consider the matter afresh and on principle.

In my opinion, the passage which I have above quoted from the judgment of Bankes L.J. correctly states the conclusion of law in the present case; I agree with that conclusion and with the reasons which Bankes L.J. gave for it. In order to close an account of this kind effectually it is necessary for the cotton broker to sell and the sale must be a valid one. He could not himself take over the open contracts at the price of the day; a sale to himself would be a mere nullity. There can be no doubt that if any profit is realized in a case of this kind by the broker who has repurchased from the person to whom he sold under a simultaneous arrangement, such as existed in this case, he would have to account for that profit to his client. Indeed it is on this very ground in the present case that Thomson has been held liable to account to the plaintiff for a small profit of 50*l.* made on a resale of the Egyptian cotton. An agent cannot retain for himself such a profit arising out of a transaction in which he was acting in a fiduciary capacity: see *Ex parte Lacey* (1) and *Ex parte James.* (2) As Bankes L.J. further points out in the passage which I have quoted, if the sale which he effected to close the account was under the market price he would be liable in damages.

(1) 6 Ves. 625. (2) 8 Ves. 337.

H. L. (E.) 1924 CHRISTOFORIDES v. TERRY. Viscount Finlay.

It is now urged that we ought to go further and should refuse to treat the account as effectually closed by such a transaction, which in its second stage vests the property of the client in the broker. In my opinion, any such decision would not be warranted by the law and would occasion great inconvenience in practice. The sales to Eccles and to Laredo were real sales, and indeed it was for that very reason that Eccles and Laredo were able to effect the resales to the broker. It is true that the scheme involved that the purchaser should immediately part with his rights by an immediate resale to the broker. But the vesting of these rights in the purchaser, even for an infinitesimal space of time, is quite enough to close the account as between the broker and his customer. I cannot see that this result is nullified by the improper resale to the broker which accompanies it. If the first sale by the broker was at too low a price the broker is liable in damages, and if the broker makes a profit out of the resale to him by again selling at an enhanced price, he must account to his client for such profit, as the resale by him would be voidable at the option of the client.

There is no authority for the proposition that in such a case the account as between broker and client still remains open, and it seems to me that such a proposition is, on principle, unsound. The simultaneous resale to the broker does not vitiate the first sale by the broker, which closed the account, and we have had no authority cited to us which would lead to any such conclusion.

For these reasons I think that this appeal should be dismissed. I desire to express my sense of the ability with which this case has been argued on both sides.

LORD DUNEDIN. My Lords, I agree. From the first I thought that the case for the appellant was based on a confusion of thought, and the progress of the argument did not dispel that impression. It was admitted that unless the transactions in American and Egyptian cotton could be put aside altogether, the appellant could not succeed. Now, what were those transactions ?

They were transactions by which Thomson & Co., as brokers, bought cotton for Christoforides. The broker was an agent to buy, not sell. It was true that on the client failing to produce the money the broker then had a right, by the rules of the exchange, to sell what he had not yet delivered to indemnify himself against the loss for which he had become liable to the person from whom he bought. It is true that he then becomes an agent to sell, but that is a different transaction. I assume that if he sells to himself he could be called to account as a trustee. So here, assuming contrary to the finding of the Court of Appeal, the sales to Eccles and Laredo to be mere blinds and not real sales, and that the real sales were to J. Shaw, alias Thomson, if Christoforides could have shown that the market had gone up, he would have been entitled to hold the original transaction as not effectually closed by these sales, but as closed by the subsequent superior prices. But to say that because Thomson sold to himself, that vitiated the original transaction under which Thomson bought from Christoforides is to take a step for which there is no authority.

Various cases were cited, but none of them in point. *Rothschild's Case* (1), which was strongly founded on, may be taken as an example. There it was an initial transaction which was no transaction at all. If here the original purchase had been of Thomson's own stock, then the case would have been in point. The prices have never recovered, the cotton was eventually sold by Thomson at a further loss, so that to that extent the appellant has actually benefited by its being held that the original transaction was closed on the terms of the sale of Eccles and Laredo.

LORD SUMNER (read by LORD CARSON). My Lords, the finding that the sale contracts, by which Thomson & Co. closed the appellant's open purchase contracts, were genuine and binding contracts, appears to me to dispose of this appeal. Although the rules and regulations of the Liverpool Cotton Association, Ld., pursuant to which they were

(1) 5 Bli. N. S. 165.

H. L. (E.) 1924 CHRISTOFORIDES v. TERRY. Lord Sumner.

effected, are not in the Record before your Lordships, it has been taken throughout that they were of a type corresponding in this respect to those of the London Stock Exchange. If so, it becomes immaterial that Thomson & Co. immediately afterwards entered into contracts of purchase with the same parties for identical qualities and quantities of cotton deliverable at the same date, and that these contracts were expected to be disposed of by setting them off and by payment of differences without actual tender or delivery of cotton. The evidence fully justified the learned judge's finding.

The allegation made in the Court of Appeal that a secret profit could be detected in connection with these fresh purchases, and the concession by the respondent thereupon of a credit of 50*l.* to avoid further expense and discussion ought not to be treated as extending the appellant's rights on this appeal. He must take the credit as it was offered—namely, as a concession without admission. The facts have not been investigated so as to establish any secret profit, and the plaintiff was bound in the interest of the creditors, for whom he was acting, to keep down the costs.

Nothing remains except the contention that the transaction now in question can be affected by Thomson & Co.'s conduct in other similar but distinct transactions, opened at about the same dates and closed at the same time. In these. admittedly secret profits were made, which have been accounted for to the appellant, and things were done by Thomson & Co. which were inconsistent with their obligations as agents, and accordingly their claims connected with such irregular transactions have been abandoned. There, I think, these matters end, and the irregularities so committed leave unaffected the right to close the contracts now in question, and to claim an indemnity for the unsatisfied balance. Principals have three rights as against agents who fail in their duty—they can recover damages for want of skill and care and for disregard of the terms of the mandate; they can obtain an account and payment of secret and illicit profits, which have come to the hands of their agents as agents; and they can resist an agent's claims for commission

and for indemnity against liability incurred as a mandatory by showing that the agent has acted as a principal himself and not merely as an agent. Each remedy is distinct and is directed to a specific irregularity.

There is accordingly no reason why the consequences of the irregular or unauthorized acts, for which these remedies are provided, should be pushed beyond the specific mischief for which they were devised. It seems to be true that Thomson & Co. were in the habit of making secret profits and of acting as principals though employed as agents, for they found it necessary to invent a certain "John Shaw," who figured as a customer in their books, to preserve the decencies of business in their office, though it does not seem to have escaped the acumen of the employees that John Shaw, whom they never saw, was really Mr. Thomson, whom they saw daily. The appellant had not escaped the depredations, often quite paltry, for which this machinery was devised, but the transactions so affected have really no connection with those under appeal, and no authority has been produced to support the contention that they have. Why Thomson & Co. who, thanks to the appellant's mandate, had made themselves liable on his purchase contracts, and thanks to his default were left personally in the lurch, should not be allowed the benefit of the right to close, which they clearly possessed and correctly exercised, I cannot conceive. If any rational ground could have been produced for the argument I should have been tempted to adopt it, for these practices are commercially mischievous and morally wrong; and as fulminations against them seem to produce no effect, all that judges can do is to try to show those guilty of them, in every way they can, that after all honesty is the best policy. Still, even a Thomson has legal rights, and cannot be treated as a kind of legal leper. I think the appeal fails.

LORD CARSON. My Lords, I concur. I only desire to add that my judgment is based on the conclusion of fact that the sales carried out by Thomson to Messrs. Eccles and Laredo

H. L. (E.) 1924 CHRISTOFORIDES v. TERRY.

and Woods respectively were genuine and bona fide sales. If that had not been the fact I should not have held that the account had been properly closed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 18, 1924.

Solicitors for the appellant: *Robert Greening & Co.*

Solicitors for the respondent: *Halse, Trustram & Co., for J. F. Read & Brown, Liverpool.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1924 *March* 31. LORD INVERCLYDE'S TRUSTEES . . APPELLANTS;

AND

MILLAR . . . . . RESPONDENT.

Revenue—Income Tax—Deductions—Claim by Trustees to deduct Sum paid as Interest upon unpaid Estate Duty—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case III., rr.* 1 *and* 2.

In the tax year 1920–1921 testamentary trustees received a sum of 72,231*l.* as untaxed interest. In returning the trust income for assessment to income tax for the succeeding tax year the trustees deducted from this sum a sum of 21,847*l.*, which they had paid for interest on unpaid estate duty on their testator's estate:—

Held, that for the purpose of assessment to income tax under Sch. D, Case III., of the Income Tax Act, 1918, the trustees were not entitled to deduct the sum paid for interest on estate duty, inasmuch as it did not fall within any of the deductions allowed by the Act, and, further, that they were not entitled to exemption from income tax on the sum so paid for interest to the Crown, either on the ground that income tax was included therein, or on the ground that that sum was received by the trustees, not on their behalf, but on behalf of the Crown.

Interlocutor of the Second Division of the Court of Session in Scotland 1924 S. C. 14 affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session as the Court of Exchequer in Scotland

* *Present:* VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of the City of Glasgow. (1)

The appellants were the testamentary trustees of the late Lord Inverclyde. The trust income received by them included for the year 1920–1921 the sum of 72,231*l.* of untaxed interest. In returning the trust income for assessment to income tax, the appellants deducted from this sum the sum of 21,847*l.*, which in that year they had paid in interest on unpaid estate duty due to the Crown on Lord Inverclyde's estate. The first assessment made upon the appellants for the year 1921–1922 was upon the balance thus obtained, of 50,384*l.* An additional assessment on the said sum of 21,847*l.* was subsequently made upon them. Against this additional assessment the appellants appealed to the General Commissioners of Income Tax, who confirmed the assessment subject to the case stated by them. The question of law submitted for the opinion of the Court was whether for the purpose of assessment under Sch. D, Case III., of the Income Tax Act, 1918, the appellants were entitled to deduct from the 72,231*l.*, being interest received for the year ending April 5, 1921, the sum of 21,847*l.* of interest paid on estate duty for the same period. The Second Division (the Lord Justice-Clerk, Lord Ormidale, Lord Hunter, and Lord Anderson) answered this question in the negative, and confirmed the determination of the Commissioners.

The arguments on the appeal sufficiently appear from the judgment of Viscount Cave.

1924. March 28, 31. *Moncrieff K.C.* and *James Keith* (both of the Scottish Bar) for the appellants cited *Ashton Gas Co.* v. *Attorney-General* (2); *London County Council* v. *Attorney-General* (3); *Sugden* v. *Leeds Corporation.* (4)

Sir Patrick Hastings A.-G., Macmillan L.A., Sir Douglas

(1) 1924 S. C. 14.
(2) [1906] A. C. 10; [1904] 2 Ch. 621, 623.
(3) [1901] A. C. 26, 37, 40.
(4) [1914] A. C. 483.

H. L. (Sc.) 1924

LORD INVERCLYDE'S TRUSTEES v. MILLAR.

Hogg K.C. (of the English Bar), *Reginald Hills* (of the English Bar), and *A. N. Skelton* (of the Scottish Bar) for the respondent were not called on.

VISCOUNT CAVE. My Lords, this is an appeal by the trustees of the late Lord Inverclyde from a decision of the Second Division of the Court of Session upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of Glasgow. During the tax year ending on April 5, 1921, the appellants received interest on Government securities to the amount of 72,231*l.*, without deduction of tax, and under the provisions of the Income Tax Act, 1918, Sch. D, and particularly under rr. 1 (*f*) and 2 of the Rules applicable to Case III. under that Schedule, they became liable to be assessed to tax in respect of that sum in the following tax year—namely, the year 1921–22. In the latter year the appellants paid in respect of interest on unpaid estate duty a sum of 21,847*l.*, that sum being paid in accordance with the provisions of s. 18, sub-s. 1, of the Finance Act, 1896, without deduction for income tax. In making their return for income tax for the tax year 1921–22 they deducted that sum of 21,847*l.* from the 72,231*l.* received for interest on Government securities, and returned the balance only—namely, 50,384*l.*—as liable to assessment for income tax. Tax was duly assessed and paid on this sum of 50,384*l.*, but an additional assessment was made on the appellants for tax on the sum of 21,847*l.* which had been deducted in the return. Against that additional assessment the appellants appealed to the Commissioners, who rejected the appeal and confirmed the additional assessment, but on the application of the appellants stated a case for the opinion of the Court of Session as the Exchequer Court.

The question of law which was submitted for the opinion of the Court of Session was formulated by the Commissioners as follows: "The question of law for the opinion of the Court is whether for the purpose of assessment under Sch. D, Case III., of the Income Tax Act, 1918, the appellants are entitled to deduct from the 72,231*l.*, being

interest received for the year ending 5th April, 1921, the sum of 21,847*l.* of interest paid on estate duty for the same period." The Court of Session unanimously affirmed the decision of the Commissioners, and thereupon the present appeal was brought.

Upon the argument of the appeal before your Lordships counsel for the appellants did not insist upon the view that the appellants had a right, for the purpose of income tax, to " deduct " (in the strict sense of the word) the 21,847*l.* from the income which they had received, and, indeed, such a contention would be plainly untenable. The case does not fall within any of the categories under which deduction (in the strict sense) is allowed by the Act. The trustees, of course, did not carry on any business. The payment of interest on estate duty was not an outgoing necessary for obtaining the income from the investments. The interest on estate duty was not legally charged upon or payable out of the sum received for dividends, but was payable out of any moneys in the hands of the appellants as trustees. It did not fall within the deductions allowed by s. 36 or any other section of the Act of 1918; and s. 209 of the Act expressly provides that " in arriving at the amount of profits and gains for the purpose of income tax (a) No other deduction shall be made than such as are expressly enumerated in this Act." Deduction, therefore, in the ordinary sense, is out of the question.

But your Lordships have not held the appellants strictly to the question as formulated by the Commissioners, and Mr. Moncrieff, in an ingenious argument, put his case in two other and alternative ways. First he said that the sum of 21,847*l.* paid for interest on estate duty included income tax on that amount, and that, although the appellants were prohibited by s. 18 of the Finance Act, 1896, from deducting tax from the interest paid, they were entitled, in bringing into computation for the purposes of income tax their untaxed interest from investments, to take credit for that amount of tax as having been actually paid to the revenue. If this argument were held good, the effect would be to

H. L. (Sc.) 1924 LORD INVERCLYDE'S TRUSTEES v. MILLAR. Viscount Cave.

render abortive the provision in s. 18 of the Act of 1896 that the interest on estate duty is to be paid without deduction for income tax; for it would enable the appellants to deduct it, not, indeed, from the interest on estate duty, but from the tax on their general income. Apart, however, from this consideration, the argument appears to me to be wholly untenable. The argument assumes that the payment of interest without deduction of the tax is equivalent to a payment of interest including the tax; but this is, as the learned judges of the Court of Session pointed out, a pure speculation or surmise. There is nothing in the Acts or cases which supports such a view. The Crown is not accountable for tax, and there is no sufficient ground for holding that a debtor to the Crown, who under statutory direction pays interest on his debt without deduction of the tax, is thereby paying a tax for which the Crown is not accountable. In my view there is no question of double imposition of tax.

Secondly, Mr. Moncrieff contended in the alternative that, as 21,847*l.*, part of the 72,231*l.* received for income on investments, had to be paid over to the Crown, the appellants must be treated as having received that sum on behalf of the Crown, and not on their own behalf, and were therefore entitled to have it excluded from the trust income brought into assessment. Mr. Keith developed the argument by suggesting that the sum in question was therefore "specially exempted" from tax within the meaning of r. 1 (b) of Sch. D. It appears to me that this argument is also misconceived. No part of the sum receivable for interest on investments was earmarked for the payment of interest on estate duty or charged with the payment of such interest. The appellants owed the interest on estate duty to the Crown, and they were entitled to pay it out of any funds in their hands which might be available for the purpose; and their relationship to the Crown in this respect was similar to their relationship to any other creditor of the estate. Mr. Moncrieff suggested as a foundation for this argument that when a taxpayer collects an income and is subject to the obligation of diverting

it into two streams, one of which streams is to flow to the coffers of a creditor, then he must be considered to have collected that part of his income for and on behalf of the creditor. I am unable to assent to that principle. In my view the taxpayer in such a case collects the whole income for himself, and then (if he is an honest man) pays his debt to his creditor; but he does not in any true sense of the word collect that part of his income for the creditor. If so, it is incorrect to say that any part of the income from investments was received by the trustees as collectors for the Crown, or that the Crown is, within the meaning of the expression as used in the cases, the "ultimate recipient" of any part of the income. On this point the decision in *Alexandria Water Co.* v. *Musgrave* (1), which was approved by this House in the *Gresham Life Assurance Society* v. *Styles* (2), is in point.

My Lords, on the whole case I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

VISCOUNT FINLAY. My Lords, I agree that this appeal fails.

LORD DUNEDIN. My Lords, I agree. In the hands of the learned counsel for the appellants a most intricate and ingenious statement has been evolved. The case also permits of a very simple statement. Estate duty would be exigible at once as a payment, but it has been thought better that payment should be postponed by means of instalments. In return for that a sum is charged in the name of interest. I think that sum is an ordinary debt, but, to make it quite certain that it is an ordinary debt and not a profit, s. 18 of the Finance Act, 1896, says that it is to be paid without deduction of income tax. I am afraid I think the simple statement is the true statement, and that ends the case.

LORD SHAW OF DUNFERMLINE. My Lords, there are no merits in this appeal.

(1) (1883) 11 Q. B. D. 174. (2) [1892] A. C. 309.

H. L. (Sc.) 1924 LORD INVERCLYDE'S TRUSTEES v. MILLAR.

LORD SUMNER. My Lords, I agree in the motion to be proposed from the Woolsack.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, March 31, 1924.

Agents for the appellants: *Grahames & Co., for Moncrieff, Warren, Paterson & Co., Glasgow, and Webster, Will & Co., W.S., Edinburgh.*

Agent for the respondent: *The Solicitor for England of the Board of Inland Revenue, for the Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1924 *April* 10.

LORD ADVOCATE . . . . . APPELLANT;

AND

MACALISTER . . . . . RESPONDENT.

Revenue—Succession Duty—Rate of Payment—"Succession arising"—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 1, 2, 10, 20—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 58, *sub-ss.* 1 *and* 4.

The Finance (1909–10) Act, 1910, by s. 58, sub-s. 1, increases the rate of succession duty to 10 per cent. in cases where under the Succession Duty Act, 1853, s. 10, it would have been 5 per cent., and enacts by sub-s.4: "This section shall take effect . . . . in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after" April 30, 1909.

A testator, who died in the year 1900, bequeathed the fee of his heritage to a cousin, subject to a liferent to the testator's mother, who died in the year 1910:—

Held, that the first succession arose in favour of the cousin at the death of the testator; and accordingly that the cousin became liable at the death of the life rentrix to pay succession duty at the rate of 5 per cent. only.

Attorney-General v. *Anderton* [1921] I K. B. 159 considered.

Decision of the First Division of the Court of Session in Scotland 1923 S. C. 495 affirmed.

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* *Present:* VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

APPEAL from two interlocutors of the First Division of the Court of Session in Scotland as the Court of Exchequer in Scotland, the first affirming an interlocutor of the Lord Ordinary (1), and the second decerning against the appellant for payment of the expenses of the action.

By an ante-nuptial contract made in June, 1860, on the occasion of the marriage of Mrs. Wallnutt with Captain Thomas Wallnutt Mrs. Wallnutt conveyed her undivided half of certain estates in Ayrshire to trustees upon trust to pay her the income of the trust estate during the subsistence of the marriage, and, if there should be issue at the dissolution of the marriage, upon trust to continue to pay her the income of the trust estate, if she were the survivor, during her life, and the contract provided that at her decease the eldest son should succeed to the heritable estate thereby conveyed.

There was issue of the marriage one son, Major Claude Wallnutt.

Captain Thomas Wallnutt died in 1874 in the lifetime of his wife. Major Claude Wallnutt made a holograph will dated July 23, 1882, whereby he bequeathed and disponed his whole estate to his mother in liferent and to the respondent, in fee. The respondent was the son of a sister of Mrs. Wallnutt. Major Claude Wallnutt died on January 6, 1900, and Mrs. Wallnutt died on June 16, 1910.

This action was brought by the Lord Advocate against the respondent, in effect, to determine the rate at which succession duty should be paid by the respondent on his succession to the Ayrshire estates.

The rate of succession duty payable by the respondent under s. 10 of the Succession Duty Act, 1853, was 5 per cent. on the value of the succession, and by s. 20 the duty imposed by the Act was to be paid on the successor becoming entitled n possession.

By the Finance (1909–10) Act, 1910, s. 58, sub-s. 1, the 5 per cent. duty under the Succession Duty Act was increased to 10 per cent. But by sub-s. 4 "this section shall take

(1) 1923 S. C. 495.

H. L. (Sc.) 1924 — LORD ADVOCATE v. MACALISTER.

effect . . . . in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after " April 30, 1909.

The question for determination was whether succession duty was payable by the respondent at 5 per cent. or at 10 per cent.

The Lord Ordinary (Lord Blackburn) decided that the succession arose on the death of the testator in 1900, and that, consequently, the duty was payable at the lower rate, and the First Division, by a majority (the Lord President, Lord Skerrington and Lord Sands; Lord Cullen dissenting), affirmed his decision.

1904. March 27. *Sir Patrick Hastings A.-G.* and *Macmillan L.A.* (with them *Sir Douglas Hogg K.C.* and *Harman* (both of the English Bar) and *A. N. Skelton* (of the Scottish Bar)) for the appellant. The question whether the duty is to be paid at the lower rate under the Succession Duty Act, 1853, or at the higher rate under s. 58 of the Finance (1909–10) Act, 1910, depends upon whether the succession, which is admittedly a first succession within sub-s. 4 of that section, arose at the date when it was conferred or at the date when the respondent came into beneficial possession of it. In *Attorney-General* v. *Anderton* (1), which was a decision under the Finance Act, 1894, with which Part III of the Act of 1910 is to be read, the word " arising " in connection with succession, was interpreted as referring to the date, not when the succession was conferred on, but when it came into the beneficial enjoyment of, the successor, and it should receive the same interpretation in the later Act. The conferring of a succession stamps the property as chargeable to duty, but the actual liability to pay emerges when the successor obtains the beneficial possession, and it is then that the tax is imposed. In *Hamilton* v. *Lord Advocate* (2) the question was what was the first succession, not at what date the succession arose, and it is therefore not an authority against the appellant. The term " first succession arising " is

(1) [1921] 1 K. B. 159. (2) [1920] A. C. 50.

unintelligible, unless the succession is construed as arising at the date when possession is taken. [They also referred to *Attorney-General* v. *Earl of Sefton*. (1)]

Mackay K.C. (of the Scottish Bar) (with him *Albert Russell* (of the Scottish Bar) and *Fawell* (of the English Bar)) for the respondent. The words "succession arising" should be construed according to their ordinary meaning. A succession arises when it comes into existence—when it is created or conferred. The words have been used by the Courts in that sense long before the words were used in the Finance Acts: *Floyer* v. *Bankes* (2); *Attorney-General* v. *Robertson* (3), and it is not to be presumed that they are used in any other sense in the Finance Acts. The liability to duty attaches to a succession and to the successor when it is conferred; the right to exact payment of the duty emerges when the successor obtains the beneficial enjoyment: *Lord Wolverton* v. *Attorney-General*. (4) *Duke of Northumberland* v. *Attorney-General* (5) shows that taking a succession is the obverse of conferring and does not mean taking possession. *Attorney-General* v. *Anderton* (6), unless distinguishable as having been decided under another Act, was wrongly decided and ought to be overruled, as being inconsistent with *Hamilton* v. *Lord Advocate*. (7) In the latter case in the Court below, whose decision was affirmed by the House of Lords, Lord Mackenzie says (8): "The meaning of 'succession arising,' as used in s. 58, sub-s. 4, of the 1910 Act and of 'succession conferred' as used in s. 2 of the 1853 Act appears to me to be the same."

Macmillan L.A. replied.

The House took time for consideration.

1924. April 10. VISCOUNT CAVE. My Lords, this appeal raises a question as to the rate at which succession duty was payable on the succession of the respondent Captain Norman

(1) (1865) 11 H. L. C. 257.
(2) (1863) 3 D. J. & S. 306, 311.
(3) [1893] 1 Q. B. 293, 299.
(4) [1898] A. C. 535, 542, 548.
(5) [1905] A. C. 406, 410–12, 416.
(6) [1921] 1 K. B. 159.
(7) [1920] A. C. 50.
(8) 1918 S. C. 135, 141.

H. L. (Sc.) 1924 LORD ADVOCATE v. MACALISTER. Viscount Cave.

Godfrey Macalister, under the will of the late Major Claude Wallnutt, to property consisting of a half-share of certain freehold lands in the county of Ayr.

The succession arose in this way. Major Wallnutt (whom I will call "the testator") was beneficially entitled under the marriage contract of his parents to the property in question in fee subject to the liferent interest of his mother Mrs. Eliza Wallnutt. The testator by his will dated July 23, 1882, gave all his estate heritable and movable to his mother in liferent and to his cousin, the respondent, in fee, and died on January 6, 1900. The gift by the testator of a liferent interest to his mother was admittedly ineffective as to this property, as she already held it for her life. The life rentrix died on June 16, 1910, and thereupon the respondent became entitled to possession of the property and succession duty became payable upon it. The question is as to the rate at which such duty is to be calculated.

But for the Finance (1909–10) Act, 1910, the duty would plainly have to be calculated at the rate of 5 per cent. on the value of the succession, that being the rate fixed by s. 10 of the Succession Duty Act, 1853, in cases where the successor is a first cousin of the predecessor. By s. 58, sub-s. 1, of the Act of 1910 the 5 per cent. duty is increased to 10 per cent., but sub-s. 4 of the same section provides that "this section shall take effect . . . . in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after" April 30, 1909. It is common ground that the succession in question arose under a disposition—namely, the will of the testator—and was the first and only succession arising under that disposition; but on the question whether for the purposes of s. 58, sub-s. 4, the succession "arose" before or after April 30, 1909, the parties are at issue, the respondent contending that it arose on the death of the testator on January 6, 1900, and accordingly before the date specified in the Act, and the Commissioners maintaining that it arose after that date, that is to say, on June 16, 1910, the date of the death of the life rentrix. The Lord Ordinary (Lord Blackburn) and the First Division of

the Court of Session (Lord Cullen dissenting) have decided this point in favour of the respondent, and it is against that decision that the present appeal is brought.

My Lords, I feel no doubt that, if the word "arising" in s. 58, sub-s. 4, of the Act of 1910, is to be read in its ordinary and natural sense, the succession arose on the death of the testator. Under the provisions of s. 2 of the Succession Duty Act, 1853, any disposition of property by reason whereof any person becomes beneficially entitled to property upon the death of any other person, either immediately or after an interval, is deemed to confer a succession on the person so entitled; and the Act (by s. 10) imposes succession duty on every such succession and (by s. 42) makes that duty a first charge on the interest of the successor in the real property in respect of which it is assessed. By s. 20 of the Act the duty so imposed is made payable at the time when the successor becomes entitled in possession to his succession; but this section only defers the time for payment, in cases where the successor is not entitled to immediate possession, until the right to possession matures, and the duty is none the less imposed and charged at the moment when the succession is conferred—namely, at the date of entitlement: see *Lord Wolverton* v. *Attorney-General* (1), per Lord Herschell. This being so, it appears to me that, notwithstanding the provisions of s. 20 of the Act of 1853, the succession "arises"—that is to say, is created and comes into being—at the date when under the provisions of s. 2 it is "conferred"—namely, at the date of entitlement and not later; and that the intention and effect of s. 58, sub-s. 4, of the Act of 1910 is that, when once a succession has been so conferred by a disposition and the rate at which succession duty will be payable has been ascertained, the rate shall not for the purposes of the disposition be increased under the provisions of the section.

The above construction, which appears to me to be the natural construction of sub-s. 4 of s. 58 of the Act of 1910, derives support from the language of the earlier sub-sections

(1) [1898] A. C. 535, 548.

H. L. (Sc.) 1924 LORD ADVOCATE v. MACALISTER. Viscount Cave.

of the same section. Sub-section 2 enacts that the 1 per cent. duty thereby imposed shall not be levied when the principal value of the property passing on the death of the deceased in respect of which estate duty is payable does not exceed 15,000*l.*; and by sub-s. 3 it is provided that the word "deceased" means, "in the case of a succession arising on a disposition, the person on whose death the first succession thereunder arises." Now the person here referred to as the "deceased" is (as Lord Sands pointed out) the person upon whose death the disposition becomes operative, in this case the testator, Major Wallnutt; and if it is on his death that the succession arises for the purpose of sub-s. 3 it must surely be held for the purposes of sub-s. 4 to arise at the same time.

Against this it is pointed out on behalf of the Crown that a succession is defined by s. 1 of the Act of 1853 as denoting "any property chargeable with duty under the Act," and it is said that the use of the term "arising," as applied to property, is somewhat awkward. But the awkwardness exists whether the term "arising" is to be referred to the date of entitlement or to the date of possession; and if (as Lord Davey suggested in *Duke of Northumberland* v. *Attorney-General* (1), the expression "property" in the definition clause may be read as meaning "estate or interest in property," then the word "arising" is not inappropriate.

A further argument on behalf of the Crown was founded on the concluding words of s. 58, sub-s. 4, of the Act of 1910, "in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after that date." It was said that the expression "first succession" assumes that several successions under a disposition may arise at different dates, and that as all the successions conferred by a disposition must be conferred at one and the same time, the word "arising" cannot refer to the date of entitlement, but must refer to the date of possession. This argument appears to me to be misconceived. No doubt it often happens that all the successions under a particular disposition are conferred (as in the present case) at the date

(1) [1905] A. C. 406, 416.

when the disposition takes effect, but that is not always the case. Having regard to the language of s. 2 of the Act of 1853, it appears to me that a succession under a disposition is not conferred until some "person" who can be named or identified becomes beneficially entitled to the property upon the death of some other person, whether he becomes so entitled immediately or subject to some intervening estate or interest; and this period may be different in respect of different successions created by the same disposition. There is, therefore, no inconsistency in speaking of a "first" succession being so conferred.

As to the authorities cited, *Lord Advocate* v. *Hamilton* (1), so far as it goes, supports the decision of the Court of Session in this case. Lord Cullen (as Lord Ordinary), referring to the words "a succession arising under a disposition," as used in s. 58 of the Finance Act, 1910, said: "I think, as I have said, that these words bear reference to the Succession Duty Acts, and that, in consonance with the language of the Act of 1853, they fall to be construed as designating an occasion on which property subject to duty under that Act is conferred and taken under a disposition within its meaning." And on the appeal to the First Division, Lord Mackenzie dealt with the same point as follows: "The meaning of 'succession arising,' as used in s. 58, sub-s. 4, of the 1910 Act, and of 'succession conferred' in s. 2 of the 1853 Act, appears to me to be the same." On the appeal to your Lordships' House, the judgments of the Lord Ordinary and of the learned judges of the Court of Session were adopted and confirmed, and no objection was taken to the above-quoted statements of the law.

On the other hand, in *Attorney-General* v. *Anderton* (2) Rowlatt J. held that upon the true construction of the words in s. 18, sub-s. 1, of the Finance Act, 1894, "a succession to real property arising on the death of a deceased person" the word "arising" is to be referred to the date when the successor to real property comes into possession of the

(1) 1918 S. C. 135, 138, 141; [1920] A. C. 50.
(2) [1921] 1 K. B. 159.

H L. (Sc.) 1924 LORD ADVOCATE v. MACALISTER Viscount Cave.

property and not to the date when he acquires a title to it. That decision is not precisely in point in the present case, as it was given upon the Act of 1894 and not upon the Act of 1910; but if and so far as the reasoning of the learned judge may be taken to apply to the Act of 1910, I am disposed to think that it is contrary to the decision of this House in *Lord Advocate* v. *Hamilton* (1) (which does not appear to have been cited to Rowlatt J.) and cannot be supported.

For the above reasons I am of opinion that the decision of the Court of Session was right and should be affirmed, and that this appeal should be dismissed with costs.

VISCOUNT FINLAY. My Lords, I concur.

LORD DUNEDIN. My Lords, I agree.

LORD SHAW OF DUNFERMLINE. My Lords, I also agree.

LORD SUMNER. My Lords, I concur.

Interlocutors of the First Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, April 10, 1924.

Agent for the appellant: *The Solicitor for England of the Board of Inland Revenue, for the Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

Agents for the respondent: *Waltons & Co., for Shepherd & Wedderburn, W.S., Edinburgh.*

(1) [1920] A. C. 50.

[HOUSE OF LORDS.]

JAMES NIMMO AND COMPANY, LIMITED APPELLANTS ; H. L. (Sc.)*

AND

CONNELL . . . . . RESPONDENT.

1924

March 21.

Master and Servant—Personal Injury—Negligence—Mine—Defect in Condition of Ways and Works—Accumulation of Gas owing to Failure to inspect—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1 ; *s.* 2, *sub-s.* 1.

The accumulation of inflammable gas in a section of a mine which is being worked and traversed by workmen, in such quantities as to become explosive if a light is applied to it, is a defect in the condition of the ways and works connected with or used in the business of the mine owner within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880 :—

So *held* by Lord Dunedin, Lord Atkinson, and Lord Shaw of Dunfermline ; Lord Phillimore and Lord Blanesburgh dissenting.

McGiffin v. *Palmer's Shipbuilding and Iron Co.* (1882) 10 Q. B. D. 5 and *Willetts* v. *Watt & Co.* (1892) 2 Q. B. 92 considered.

Decision of the First Division of the Court of Session in Scotland 1923 S. C. 737 affirmed.

THE following statement of facts is taken from the judgment of Lord Atkinson.

This was an appeal from an interlocutor of the First Division of the Court of Session in Scotland affirming a determination of the Sheriff of Lanarkshire upon a stated case. The respondent, who was employed at the appellants' colliery, brought an action in the Sheriff Court at Glasgow against the appellants for damages at common law or under the Employers' Liability Act, 1880, for injuries sustained by him by an explosion of gas at the colliery. The sheriff held that the respondent was entitled to relief under the Act and assessed the damages at 325*l.* The sheriff in the case stated set out the findings at which he arrived. They included :—

1. That the Auchingeich Colliery belonged to the appellants ; that at 4 A.M. on June 1, 1920, the respondent, while employed in the appellants' service as a brusher in section

* *Present :* LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, and LORD BLANESBURGH.

H. L. (Sc.) 1924 — JAMES NIMMO & Co. v. CONNELL.

No. 3 of Pit 2 of this colliery, was injured by an explosion of gas, and that at the time of the explosion the respondent was working at a place known as the Lye in the intake airway of section 3.

2. That Auchingeich Colliery was ordinarily a gassy mine in which naked lights were not used.

3. That the appellants had, before the explosion, extended an old working by cutting through a whin intrusion and opening up an area beyond and to the north of the latter.

4. That this opening was effected by making a cutting to the left, a cutting called the left cross cut, and a cutting to the right, known as the right cross cut, and by a third cutting in line with the intake airway, known as the heading.

5. That the air which ventilated this section No. 3 passed along the intake airway through the whin intrusion, then along the right cross cut and round the face, returning by a third cutting through the whin intrusion. The Lye, where the respondent was working at the time of the explosion, was to the south of this last-mentioned intrusion.

6. That within the fortnight preceding the explosion gas had been discovered in this heading on several occasions—on two of which occasions the gas had been found to be in such quantity that it led to the withdrawal of the men working at the heading.

8. That the mine was worked on double shifts.

The sheriff then proceeded to deal with the happening o the explosion and its causes.

The ninth finding was to the effect that the ignition of the gas was caused by a spark from an electric coal-cutting machine which was being used in this section; that this machine was fitted with a switchbox cover intended to prevent sparking and the emission of flame to the outer air from the ignition of the gas in the switchbox, and was effective for that purpose if properly bolted down.

11. That at the time of the explosion the ventilation provided failed to dilute and render harmless inflammable gas to such an extent as to make the working place in the vicinity of the top of the heading fit for working.

12. That the men operating the coal-cutting machine had negligently failed to screw down the cover properly, having used only one of the eight studs provided for that purpose.

13. That during the shift the machinemen had worked the coal-cutting machine following the direction of the air from the right cross cut round the face to the top of the heading, at which point the explosion occurred.

14. That the fireman employed by the appellants to inspect the section on the respondent's shift, negligently and without sufficient excuse, failed to inspect the section, as required by the Coal Mines Act, 1911, within five hours of the previous inspection.

15. That it was a reasonable inference that if the fireman had fulfilled his duty in regard to inspection he would have discovered that there was a dangerous accumulation of gas, and could either have taken steps to clear it away or have withdrawn the workmen from the neighbourhood; and

16. That the said fireman was charged with the duties applicable to firemen laid down in the Coal Mines Act, 1911, and the general regulations thereunder.

The sheriff then stated in the words following what were his findings on the questions of law involved:—

"I found further on the evidence relative to the respondent's claim at common law that the respondent had failed to prove that his injuries had been caused by fault on the part of the appellants.

"I found in law, in these circumstances, that the accumulation of gas referred to was a defect in the condition of the ways and works connected with or used in the business of the appellants, that it had not been discovered or remedied owing to the negligence of a person in the service of the appellants entrusted by them with the duty of seeing that the ways and works were in proper condition, and that the respondent's injuries were caused by reason of said defect.

"I accordingly found that the appellants were liable to the respondent in damages under the Employers' Liability Act, 1880, but not at common law; and assessed the damages at the above-mentioned sum of 325*l.*," with interest and

H. L. (Sc.) 1924 JAMES NIMMO & CO. v. CONNELL.

expenses as already stated. He further stated that the note to his interlocutor was appended to his award, and asked for the opinion of the Court on the two following questions :—

"(1.) Was I entitled, on the respondent's pleadings, to consider whether or not the presence of gas at the working place constituted a defect in the ways and works connected with or used in the business of the appellants in the sense of sub-s. 1 of s. 1 of the Employers' Liability Act, 1880 ?

"(2.) In the event of question 1 being answered in the affirmative, was I justified in holding that the presence of gas at the working place constituted such a defect ? "

At the Bar of the House counsel for the appellants eventually abandoned the objection upon the pleadings, so that the second question stated by the sheriff was alone left for determination.

1923. Dec. 6, 7. *Condie Sandeman D.F.* (with him *Carmont* (of the Scottish Bar)) for the appellants. The mere presence of gas at the respondent's working place cannot in itself constitute a defect in the condition in the ways and works of the appellants' mine within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880. That provision points to physical defects of a permanent or quasi-permanent nature. The works were in a satisfactory condition if they were looked after in the way the appellants intended and provided, and were therefore not defective within the meaning of the Act : *Willetts* v. *Watt & Co.* (1) ; *McGiffin* v. *Palmer's Shipbuilding and Iron Co.* (2) [He also referred to and distinguished *Butler or Black* v. *Fife Coal Co.* (3)]

[LORD DUNEDIN referred to *Walsh* v. *Whiteley* (4) and LORD PHILLIMORE to *The Schwan* (5) and *Gilroy, Sons & Co.* v. *Price & Co.* (6)]

G. Morton K.C. (with him *James Keith*) (both of the Scottish Bar) for the respondent. When the explosion which caused the injury to the respondent occurred the section and the

(1) [1892] 2 Q. B. 92.
(2) 10 Q. B. D. 5.
(3) 1909 S. C. 152 ; [1912] A. C. 149 ; 1912 S. C. (H. L.) 33.
(4) (1888) 21 Q. B. D. 371.
(5) [1909] A. C. 450.
(6) [1893] A. C. 56.

place where he was working were part of the appellants' ways and works which were not safe for working and passing therein and were in a defective condition. There is no ground for limiting the words "defect in the condition and ways" to structural defect. Every part of the works and ways in the vicinity of the respondent was rendered dangerous by the accumulation of gas, and until the danger was removed the condition of the works and ways was defective. *Willetts* v. *Watt & Co.* (1) is distinguished in *Tate* v. *Latham & Son* (2), which supports the respondent's view of the sub-section; and see *Smith* v. *Baker & Sons* (3) per Lord Watson.

Condie Sandeman D.F. replied.

The House took time for consideration.

1924. March 21. LORD ATKINSON [after stating the facts:] My Lords, the vast importance attached by the Legislature to the protection of miners from the dangers they may be exposed to by the presence of inflammable or noxious gases in the ways and workings of a mine is demonstrated by the numerous minute and drastic provisions dealing with these matters contained in the Coal Mines Act, 1911. Sect. 2 of that statute provides that every mine shall be under a manager who shall be responsible for the control, management, and direction of the mine. Sect. 14 provides that in every mine there shall be appointed by the manager one or more competent persons styled firemen, examiners or deputies, to make such inspections and carry out such other duties relative to the presence of gas, ventilation, the state of roof and sides, and the general safety as are by the Act and the regulations made thereunder required. Sect. 29, sub-s. 1, provides that an adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless inflammable gas to such an extent that all shafts, roads, levels, and workings of the mine shall be in a fit state for working and passing therein, and particularly that the intake airways up to 100 yards of the

(1) [1892] 2 Q. B. 92, (2) [1897] 1 Q. B. 502.
(3) [1891] A. C. 325, 351–4.

H. L. (Sc.) 1924 JAMES NIMMO & Co. v. CONNELL. Lord Atkinson.

first working place at which the air enters shall be normally kept free from inflammable gas. Sub-s. 3 of the same section enacts that a place shall not be fit for working or passing therein (I emphasise the last two words) if it contains less than 19 per cent. of oxygen, or more than $1\frac{1}{4}$ per cent. of carbon dioxide, and that an intake airway shall not be deemed to be normally free from inflammable gas if the average percentage of such gas found in six samples, taken by an inspector in the air current at intervals of not less than a fortnight, exceeds one quarter. Sect. 64, sub-s. 1, enacts that firemen, examiners or deputies of a mine shall within such time, not exceeding two hours immediately before the commencement of work in a shift, as may be fixed by the regulations of the mine, inspect every part of the mine situate beyond the station, or each of the stations in which men are to work or pass during the shift. By the sixty-fifth section it is provided that in the case of a mine worked by a succession of shifts, as the mine in this case was, no place shall remain uninspected for an interval of more than five hours. It was the disregard of this latter provision by the fireman-examiner that the sheriff found to be the main cause of the explosion. The last section I think it necessary to refer to is the sixty-seventh, which provides that, if at any time it is found by the person for the time being in charge of a mine or of any part thereof that by reason of the prevalence of inflammable or noxious gas or for any cause whatever the mine or any place in it is dangerous, every workman is to be withdrawn from the mine or place found to be dangerous.

This statute is no doubt much later in date than the Employers' Liability Act, 1880. Its provisions show, however, what are the nature and extent of the duties which the officials of a mine are to discharge, and I think it may safely be said that the framers of the statute of 1911 would be astonished to find that an airway or other way in a mine in which miners work and through which they pass has, though it be filled with a deadly poisonous gas like carbon dioxide or a highly dangerous inflammable gas, no defect in its condition,

though it would have a defect in its condition if, to take Stephen J.'s illustration in *McGiffin* v. *Palmer's Shipbuilding and Iron Co.* (1), it had mud or water on its floor which would probably soil or wet the miner's boots.

The sheriff, in his note deals with the duties and position of Hoey. He was a fireman and shotfirer; the workings to which his duties applied were sections 3, and 5 of the mine. On the night of May 31, 1920 he went to section 5, where he had some shots fired. After he had inspected that section he detected the smell of gas in a cross cut at the wallhead. At 12.45 A.M. he fired another shot; he observed that after this shot the reek travelled slowly; he then went down to start the pump at the Lye in the fifth section. On his return at 2 A.M. he fired a second shot and after that saw that smoke was about. He thought something was wrong. He went to the door of No. 3 at 2.45. He returned at 3.15 to No. 5 and fired another shot in No. 5 and then proceeded to inspect that section before he proceeded to inspect section No. 3. On his way to inspect the latter he heard of the accident.

I quite concur with the sheriff in thinking that Hoey had not any reasonable excuse for failing to inspect No. 3 before the accident. It was most negligent on his part. He was bound under the Coal Mines Act of 1911 to inspect it within five hours of the previous inspection. It will be seen from the provisions of the Act of 1911 that the danger which inspection is directed to guard against is the accumulation of gas in these sections; and I concur with the sheriff that, on the evidence, it may be reasonably inferred that if Hoey had inspected No. 3 at the proper time, as he should have done, the presence of the gas would have been detected. His neglect to do his duty was therefore the main cause of the accident. It was not the only cause. The gross negligence of the men in charge of the drilling machine in continuing to work it without its cover having been fastened down was the other cause. The explosion was the result of those two causes combined. Hoey was entrusted by the appellants, or by the manager

(1) 10 Q. B. D. 5.

H. L. (Sc.) 1924 JAMES NIMMO & Co. v. CONNELL. Lord Atkinson.

who represented them, with the duty of seeing that the ways and works were in proper order. The appellants cannot escape liability by entrusting an unfit man, if he be unfit, with those duties. If, therefore, section 3 and the ways connected with it had, when charged with inflammable gases by reason of Hoey's neglect, a defect in their condition within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880, in my opinion the appellants are liable and the appeal should be dismissed. Section 3 is part of the workings of the mine. The ways, airways, and intake ways are ways of the mine. Men pass through both and work in both. It would appear to me to be plain that in order to determine whether ways or works, or indeed any other thing, had at a given moment a defect in their or its condition, one must have regard to the use to which these things were intended to be put, and were at the time, in fact, being put, and this for the sufficient reason that a thing may in a given condition be quite adequate for one particular use and quite inadequate for another and different use. I take as an illustration a case I mentioned at the hearing of the appeal.

Suppose there be in an ordinary dwelling house a long passage leading from the kitchen to a pantry, to which the cook and the kitchen maids must have access to discharge their household duties. I assume that the passage would in its ordinary state be adequate for the purpose for which it was used; but if, owing to leakage from a gaspipe, it got so full of gas that if one of these servants attempted to traverse it with a lighted candle in her hand she would, almost certainly, be blown up and possibly killed, and if she attempted to traverse it even without a lighted candle in her hand she would be half choked, it would appear to me impossible to hold that the passage had not, having regard to its normal use, a defect in its condition, though it might be an admirable storehouse for trunks and empty wine cases. Ways in a mine serve many purposes: (1.) ventilation, (2.) passage of miners to and from their work, (3.) work in them, so as to extend them, by drilling through obstacles such as whin intrusions, and, lastly, I suppose work must include the

transport along them to the foot of the shaft of coal won in the workings to be carried to the surface. All these things require manual labour to be applied to them. Air is needed to enable the workers to breathe, and also needed to dilute inflammable or noxious gases so as to render these innocuous. I cannot think that ways in which human beings work and which they traverse can, however well made and maintained, be considered to have no defect in their condition, though they should be filled with a poisonous gas like carbon dioxide, which would kill in a few moments any one who breathed it. I think the language of s. 2, sub-s. 1, applies. In my view, therefore, as I have said, there is a defect within the meaning of s. 1, sub-s. 1, in the condition of ways and works in a mine when from any cause they are in a condition which renders them unfit for the uses for which they were designed, to which they were intended to be put, and are in fact being put. One would have expected that in the forty-three years which have elapsed since the Employers' Liability Act, 1880, was passed, the meaning of s. 1, sub-s. 1, would have been definitely and clearly determined. It is not so. Yet the authorities are progressive, and I hope presently to show that they, on the whole, support the contention I have put forward.

One gets some help, I think, from the judgment of Lord Watson, delivered in *Smith* v. *Baker & Sons*. (1) There a crane which travelled on rails was used to raise stones from a quarry and load them on trucks. In performing this work the suspended stones were swung by the crane over the heads of men, amongst whom was the plaintiff, who were engaged in the quarry drilling holes for blasting. The plaintiff up to the month of February, 1888, had been one of the men using the crane for this particular work; he therefore knew all about the working of it. While a suspended stone was being swung to a lorry it fell upon the plaintiff and injured him. As the plaintiff was well acquainted with the manner in which the crane was worked, the principal, if not the only, defence relied upon was that the maxim "Volenti non fit injuria" applied; but three questions had

(1) [1891] A. C. 325, 351–3.

H. L. (Sc.) 1924 JAMES NIMMO & Co. v. CONNELL. Lord Atkinson.

by the county court judge been left to the jury. First, was the machinery for lifting the stone from the cutting, taken as a whole, reasonably fit for the purpose for which it was applied? (2.) Was the omission to supply special means of warning when the stones were being lifted a defect in the ways, works, machinery, and plant? (3.) If so, were the employers or some persons engaged by them to look after the condition of works, etc., guilty of negligence? The jury answered the first question in the negative and each of the two others in the affirmative. Lord Watson criticized these questions and came to the conclusion that the jury by their answers to them did not mean to find that there was any specific flaw in the crane itself or its tackle, but that the system of using the crane was not reasonably fit for its purpose, inasmuch as it exposed workmen engaged in another department to unnecessary danger, and, second, that the use of the crane without warning to the workmen over whose heads its load was jibbed constituted a defect in the works. As the action was instituted under the Employers' Liability Act, 1880, if this last statement means, as it apparently does mean, that the improper or careless use of a machine, sound and flawless in itself, may amount to a "defect" in the works within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880, then it does help in the construction of that sub-section very considerably, inasmuch as it amounts to an expression of an opinion that the improper or incautious use of a machine, perfect in itself, may constitute a defect in its condition within the meaning of this section, and, moreover, it gets rid of the notion that a defect is not a defect within the meaning of this sub-section in the ways, works, plant, etc., unless it amounts to a physical or material defect. If this be the result of Lord Watson's judgment, I heartily concur in it. Lord Watson continued: "But, as I understand the law, it was also held by this House, long before the passing of the Employers' Liability Act (43 & 44 Vict. c. 42), that a master is no less responsible to his workman for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect

in the machinery itself." And he refers, in support of this latter proposition, to the case of *Sword* v. *Cameron*. (1) He also refers to the judgment of Lord Wensleydale in *Weems* v. *Mathieson* (2), in which that most learned Lord expressed the opinion that a master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.

Willetts v. *Watt & Co.* (3) is a rather peculiar case. The plaintiff was employed to work in a large workshop, in which part of the business of the factory was carried on. There was a catchpit in the floor, which was generally covered by a lid. This lid had been removed for a temporary purpose. The plaintiff, when passing from one side of the workshop to the other, fell into this pit, of the existence of which he was ignorant. It was held that the floor of the shop was a "way," but that the hole was not a defect in it within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880. The grounds upon which this judgment of the Court of Appeal seem to have been based are rather peculiar. Lord Esher said: "No defect in the way is shewn, but only a negligent user." I presume that by that it is meant that the plaintiff by falling into the pit was using negligently the way over the floor. But I confess I fail to see how, if a way has an open pit in it, it has not a defect in its condition. Fry L.J. said that the defect must be of a chronic character to come within the section and not arise from negligent user. He refers to *Walsh* v. *Whiteley* (4), where this distinction is dealt with. He says that the way—i.e., the floor of the shop—was properly adapted to serve a double purpose. The catchpit might be used when required, or the place might be used for general purposes, including the right of way. The negligence consisted in the plaintiff's falling into the pit. Lopes L.J. says that there was no defect in the original construction of the way—i.e., the floor—nor in the subsequent condition of the way. It was not out of repair, but was still as it had always

(1) (1839) 1 D. 493.
(2) (1861) 4 Macq. 215, 226.
(3) [1892] 2 Q. B. 92.
(4) 21 Q. B. D. 371.

H. L. (Sc.) 1924 JAMES NIMMO & Co. v. CONNELL. Lord Atkinson.

been intended to be, a way with a well in it covered by the lid and there was nothing wrong with the lid. The true mode of stating the facts of the case, he said, is that there was no defect in the condition of the way, but a negligent user of it. That does not seem to me to be a very satisfactory decision.

In *Walsh* v. *Whiteley* (1) Lopes L.J. (delivering the judgment of himself and Lindley L.J.), in considering s. 1, sub-s. 1, and s. 2, sub-s. 1, together, said: "It must be a defect in the condition of the machine, having regard to the use to which it is to be applied or to the mode in which it is to be used." He previously had said: "The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation." And then he gives a definition of a defect to satisfy both of these sections, thus: "It must be a defect in the original construction or subsequent condition of the machine rendering it unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer." This judgment supports completely my contention that it is the use to which a thing is intended to be put and is being put which must be considered when the question whether or not there is a defect in its condition has to be determined.

The case of *McGiffin* v. *Palmer's Shipbuilding and Iron Co.* (2) seems to me to be opposed to my contention. There Stephen J., in giving judgment, said: "A defect in the condition of the way, or works, or machinery, or plant . . . . means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word 'condition' is applied are for the time being altered in such a manner as to interfere with their use." So far that seems to support my contention, but then he proceeds to say: "For instance, if the way is made to be muddy by water, or if it is made slippery by ice, in either of these cases, I should say that the way itself is not defective, but the condition of the way, by reason of the water which is

(1) 21 Q. B. D. 378. (2) 10 Q. B. D. 5, 9.

incorporated with it, or from its being in a freezing state, is affected." According to this judgment a way so muddy that a miner going to his work would soil his boots in passing along it would have a defect in its condition; but a way unaltered materially or physically, yet so full of poisonous gas that if a miner walked along it in the usual fashion he would be killed by the gas, would have no defect in its condition. With all respect, I think that judgment, if it means this, is entirely unsound, and its unsoundness consists in this, that it treats the word "defect" as referring solely to a material defect in the structure or substance of the way.

In *Tate* v. *Latham & Son* (1) a circular saw was used; it required to be guarded, and was, in fact, guarded. The sawyer in charge, for his own convenience, removed the guard while the machine was in motion; and it was left unguarded. The plaintiff fell against it and was injured. It was held by the Court of Appeal that the absence of the guard was a defect in the condition of the machine. This case supports the view I have put forward, and I am, therefore, of opinion that the First Division was right in answering in the affirmative, as they have done, the second question addressed to them.

I was under the impression that during the argument the Dean of Faculty abandoned the point raised as to the sufficiency of pleading and that, therefore, it was not necessary that the first question put by the sheriff should be answered.

If I am right in this I think the appeal fails, and should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I am so satisfied with the careful analysis and, as it seems to me, the conclusive reasoning of my noble and learned friend Lord Atkinson in this appeal, that I find it to be unnecessary for me to do anything by way of supplement except to note the following three points :—

(1.) In the citation of authorities in a case of this character

(1) [1897] 1 Q. B. 502.

H. L. (Sc.) 1924 JAMES NIMMO & Co. v. CONNELL. Lord Shaw of Dunfermline.

I confess that the judgment of this House in *Butler or Black* v. *Fife Coal Co.* (1) appears to me to be one of the most leading helpfulness. I do not refer to the opinion delivered by myself, but to the most elaborate and deeply considered judgment of Lord Kinnear. The application of the doctrines of responsibility in reference to the safety of mines was there discussed with such precision that I express no surprise at the repeated reference to it in the judgment of the learned Sheriff of Lanarkshire.

(2.) For myself, I am very well content to accept these sentences from the sheriff's opinion, which I here repeat, as clearly covering the situation of affairs in the present case :—

"The next question is whether the defenders are responsible for Hoey's negligence under the Employers' Liability Act, 1880, and this question, I think, must be answered in the affirmative. In my opinion, the accumulation of gas in the workings was a defect in the condition of the ways and works of the mine within the meaning of sub-s. 1 of s. 1 of the Act: *Butler or Black* v. *Fife Coal Co.* (2), especially per Kingsburgh, Lord Justice-Clerk, and per Lord Kinnear. I think also that the condition imposed by sub-s. 1 of s. 2 of the Act is satisfied in respect that the defect was not discovered or remedied owing to the negligence of the fireman Hoey, who was the person entrusted with the duty of seeing that the ways and works were in proper condition. It is argued that the accumulation of gas was not a defect of so permanent a character as to be a defect in the condition of the ways and works within the meaning of sub-s. 1 of s. 1. I am unable to accept that view. The presence of gas in the ways or works of a mine does not resemble a casual obstruction affecting the safety of ways, or a chance of escape of gas causing danger in a factory, for in the case of a mine, or at all events a gassy mine, gas is one of the dangers which requires to be provided against by special precautions, and I think it impossible to hold that the presence of gas in the ways or works is not a defect in the condition of the ways

(1) [1912] A. C. 149; 1912 S. C. (H. L.) 33.

(2) 1909 S. C. 152, 162; 1912 S. C. (H. L.) 33, 40.

or works. I also refer to *Black's Case* (supra) as an authority supporting my view."

In a previous passage of this valuable opinion the following sentence also occurs, to which I respectfully give my adhesion :—

"The next question is whether, if Hoey had inspected No. 3 section in accordance with his duty, the accident would have been prevented. The answer is that this can only be matter of inference, but, in considering the question it must be kept in mind that one of the main reasons for requiring the regular inspection of mines by firemen is to provide a safeguard for the men employed against the danger of gas accumulating in dangerous quantities. And if a precaution provided against a particular danger has not been taken and an accident results by reason of that danger, it is not enough for the person responsible for taking the precaution to say that it is not proved that, had he done his duty, the danger would have been averted. The burden is on him to prove the contrary, and in the present case it cannot be said to be proved that if Hoey had performed his duty in the matter of inspecting No. 3 section the presence of gas in the heading would not have been detected and the accident prevented by steps being taken either to clear the gas away or to withdraw the men working at the coal cutter. On the contrary, I think it may be reasonably inferred that, had Hoey made the inspection which he should have made, the presence of the gas would have been detected and the necessary steps taken to prevent untoward consequences."

I take the liberty of adopting these admirable sentences as expressing exactly the opinion which, after full reflection, I have formed in this case.

(3.) Numerous cases were referred to as to what constitutes a defect in ways and works. I think that the present case is a fortiori of them all, for, in my opinion, an accumulation of gas in a pit not inspected according to the provisions of a statute constitutes a defect in the ways of the mine. To work in those ways or to traverse them could only be accomplished with the result or at the peril of injury or of death.

H. L. (Sc.) 1924 JAMES NIMMO & Co. v. CONNELL. Lord Shaw of Dunfermline.

I cannot hold that ways which could not be wrought in or traversed except with such result or at such peril were not defective. To say that they were not defective appears to me to be a travesty of language. Nor does it appear to me to matter that such result was caused by explosion rather than by inhalation. In my view that cannot affect the legal responsibility in issue.

I conclude by repeating my agreement with the judgment of my noble and learned friend Lord Atkinson.

LORD PHILLIMORE. My Lords, at the close of the argument delivered on behalf of the appellants at your Lordships' Bar, it was, I think, plain to you that all preliminary questions must be disposed of in favour of the respondent Connell, and that the only question worthy of consideration was whether coupling the eleventh finding of fact by the Court of Session with the fourteenth there was sufficient to entitle Connell to recover his damages under the Employers' Liability Act, 1880.

The eleventh finding is as follows :—

That at the time of the explosion the ventilation provided failed to dilute and render harmless inflammable gas to such an extent as to make the working place in the vicinity of the top of the heading fit for working.

If the state of things thus found amounts to "a defect in the condition of the ways or works connected with or used in the business of the employer," and thus brings the employers under s. 1, sub-s. 1, of the Act, I think all your Lordships were agreed that the workman had proved sufficient to bring himself also under the enabling condition of sub-s. 1 of s. 2, as found by the fourteenth finding.

I address myself therefore to the question whether the gassy condition of the mine, which was one of the causes of the accident to the workman, can be deemed a defect in the condition of the ways or works of the mine.

My Lords, the Employers' Liability Act, 1880, was passed, as far as I can see, either to give a right or to take away a defence to a claim of right (it would be pedantry at this time

of day to discuss the reason of the earlier jurisprudence) broadly, in two cases: (1.) where the fellow servant of the injured man had been put by the employer into a position of superiority and control over the injured man, and (2.) where the injury was due to the failure of the employer to supply a safe and proper place and surroundings in which to work, and safe and proper materials and tools to handle. Your Lordships have to do with the second of these heads, in respect of which I conceive that the Legislature has imposed an initial duty, as I may call it, upon the employer. During the argument I kept in my mind likening the condition to that imposed upon shipowners to provide a seaworthy ship. It is, as I think Lord Sands rightly expressed it, "a static condition" of the ways and works, or, indeed, if it were in question in this case, of the plant and machinery, which is required of the employer.

The delicacy of the distinction upon which the respondent relies may be illustrated by taking the case of two pumps, one for water and one for air. The water pump will raise and deliver hot water. It is properly arranged and guarded, but it happens that a mine worker puts himself in the way of the stream as it is delivered from the pump, and the pump man does not notice him and negligently continues to pump so that he is scalded. This will be negligence by a fellow workman and will give no right of action. The air pump delivers fresh air into the mine and so dilutes the noxious gases. The pumpman negligently discontinues pumping, and the mineworkers suffer. This again is negligence of a fellow servant, and as such, gives no right of action. But it is suggested that the Court can transcend this consideration and look at the state produced by the negligence and say that there is a defect in the condition of the works—however caused—and that for this the employer is liable.

My Lords, as far as I can ascertain, the counsel brought before your Lordships all the decided cases which could give you assistance, and there are but four. I take them in chronological order.

H. L. (Sc.) 1924 JAMES NIMMO & Co. v. CONNELL. Lord Phillimore.

McGiffin v. *Palmer's Shipbuilding and Iron Co.* (1) was decided in 1882. In that case a tap, temporarily left by a workman, projected into the way along which another workman was wheeling a ball of red-hot iron and upset the wheelbarrow, causing the ball to fall on the man and kill him. The Divisional Court (Field and Stephen JJ.) held that this was not a defect in the condition of the way, and rejected the claim.

After a second perusal of their judgments, I conclude that both judges relied upon the fact that the obstruction was not something which grew out of the structure of the way, but was something adventitious, something which, as Stephen J. expressed himself, "cannot be said to be incorporated with it." Both judges gave an illustration which would help the workman in the present case, for they speak of the condition of being slippery with ice as one which would make a defect in the condition of the way. But with all deference to them, if they intended to decide the case merely on the ground that the obstruction was adventitious or foreign, it was an unsafe ground. If a cart travelling along a highway be negligently allowed to let some stones (part of its burden) fall on the road, and the carter negligently leaves them behind, the driver of a following vehicle is just as likely to suffer injury from their presence as if they were stones sticking up from a badly broken up part of the road. But I think no one would say that the upsetting of these stones constituted an immediate obstruction for the presence of which the highway authority would be liable. Aliter, if the highway authority allowed the obstruction to remain for days. It is not the source of the danger but its duration that seems to be pointed at; and Field J. seems in the end to take this view when he closes his judgment by saying that the "defect must be something in the permanent or quasi-permanent condition."

Walsh v. *Whiteley* (2), decided in 1888, does not seem to have much bearing on this case. Perhaps its principal value lies in the various observations made by Lord Esher M.R. in the Court of Appeal, and on the whole assented

(1) 10 Q. B. D. 5. (2) 21 Q. B. D. 371.

to by the Lords Justices, that a liberal construction in favour of the workman should be given to the statute. The tenor of mind of the Master of the Rolls is not without importance when your Lordships come to consider the next case.

Willetts v. *Watt & Co.* (1) is the authority nearest this case. In the floor of the workshop there was a catchpit covered by a lid. The shop was a place of passage through which workmen travelled, having to a certain extent to pick their way between a number of heavy articles which were on the floor. The lid had been removed for some not improper purpose, and a workman passing across the floor did not observe this, fell into the catchpit and was injured. The Divisional Court held that there was no regular way across the shop, and therefore that the absence of the lid did not cause a defect in the way. But the Court of Appeal took a different view, and said that the passage across the floor was a way; and this led the Court to determine whether the absence of the lid was a defect in the way. All the members of the Court thought that it was not a defect within the meaning of the statute. Lord Esher said: "There was nothing wrong with the construction. . . . . The lid was there for the purpose of being taken off if occasion required, and on this occasion it was taken off and left this hole." It followed that it was a case of negligent user. Fry L.J. said that "the language of sub-s. 1 points to a defect of a chronic character." Lopes L.J. said: "There was no defect in the original construction, nor in the subsequent condition of the way. It was not out of repair, but was still, as it had always been intended to be, a way with a well in it covered by a lid, and there was nothing wrong with the lid. . . . ."

In *Tate* v. *Latham & Son* (2) a saw worked by machinery had a guard to it, which the man in charge of the saw removed in the course of an afternoon, because he thought that it hindered its working. He left the guard off when he left off work, and it was still off at eight o'clock next morning after steam power had been applied, and the saw was turning,

(1) [1892] 2 Q. B. 92, 98, 100, 101.
(2) [1897] 1 Q. B. 502, 505, 506, 507, 510.

H. L. (Sc.) 1924 — JAMES NIMMO & Co. v. CONNELL. — Lord Phillimore.

but apparently before the workman came back to it; and a cleaner tripped and fell upon the saw and got injured. The case was tried before a county court judge and a jury, and the judge withdrew the case from the jury, thinking upon the evidence that no case was made out. This decision was reversed by the Divisional Court (Wright and Bruce JJ.), and a new trial was ordered, which was affirmed by the Court of Appeal. Both judges in the Divisional Court felt some difficulty in dealing with the authority of *Willetts* v. *Watt & Co.* (1) Wright J. disposed of it by saying that "there the lid of the catchpit was properly removed in the course of the ordinary and proper conduct of the business." He added that the negligence complained of did not consist in removing the lid, but in not giving proper warning, and he proceeded to comment on the very obvious defect in the sawbench while the guard was away. Bruce J., I think, took the same view of *Willetts* v. *Watt & Co.* (1), though he was not quite so express as Wright J. He added that if the guard had been out of its place for a month it could not be doubted that the sawbench was incomplete and therefore in a defective condition. He said that it was "immaterial to consider (apart from the question of negligence) how long the defect had existed." In the Court of Appeal Lord Esher said that a machine could not "rightly be said to be in a proper condition, merely because there was a guard provided . . . . if that guard was not so fitted whilst it was in motion." Chitty L.J. concurred.

My Lords, it so happens that I was long a colleague of Bruce J., and I have a high respect for the soundness of his judgment. But I would pause for a moment upon his assumption that it was immaterial to consider how long the defect had existed. Let me trouble your Lordships with two more illustrations. Probably all of you have been in a cotton-spinning factory and have seen how the men work in the spinning room in the thinnest and most reduced garments, and, I think, bare feet. If upon one of these men, without giving him time to retire or put on a wrap, a large

(1) [1892] 2 Q. B. 92.

window was opened by the negligence of a fellow servant on a cold day, the sudden lowering of temperature thereby produced would create an atmosphere unsafe for him (perhaps quite as unsafe as a gassy atmosphere), as it might lead to pneumonia and death. Would it be the proper way, my Lords, of looking at that case to consider it as one where there was a defect in the condition of the works and throw the responsibility on to the employer; or would it not be right to say that the cause of the accident was the negligence of a fellow servant?

Then I would take the case of machinery or plant. A firm keeps a motor bicycle for its messengers. A fellow servant cleans the bicycle and pumps it up, but in a hurry, and hands it over to the messenger with the little cap off the tube by which the tyre is inflated, or possibly with the cap imperfectly fixed. As soon as the messenger starts the tyre becomes deflated, and the messenger is thrown upon his head. Is it reasonable to look upon this as a defect in the condition of the cycle, or should it be considered as a simple act of negligence by a fellow servant?

My Lords, I think we must all avoid the temptation of glossing the case over by saying that in all these illustrations the way or machinery was in a defective condition. The word "condition," so used, has not the same shade of meaning as the words "condition of" in the statute.

I come back, after consideration, to the "quasi-permanent condition" of Field J., and "the chronic character," or, as one report of his judgment says, I think, the "quasi-chronic character," of Fry L.J., and the "static condition of danger" of Lord Sands. I think this is the real test. It must be a standing, and not an accidental and quite temporary defect.

This leaves one to consider whether the gassy condition of the mine at the moment of explosion should be deemed to be of a standing or of a temporary character. For this purpose, in order to comply with the provisions of s. 2, sub-s. 1, it must be a gassy condition which, but for negligence, should have been discovered, and the only negligence is that the fireman did not come round within the five hours.

H. L. (Sc.) 1924 JAMES NIMMO & Co. v. CONNELL. Lord Phillimore.

Therefore, what we should know is how long after the five hours the explosion occurred. As to this there is no finding in the case stated by the sheriff. All he says is that the fireman negligently failed to inspect within five hours of the previous inspection. If I refer to the pleadings I find in the sixth condescendence, "the place in which the pursuer was then working had not been inspected for an interval of more than five hours": and the answer: "Explained further that John Hoey, the fireman who was in formal charge of section 3 and section 5, was delayed in section 5, and it was somewhat later than the normal hour before he arrived at section 3." I have looked at the note of the Sheriff Substitute, but I cannot trace the point of time there. If, as I think, it is important to show duration, it is for the pursuer to do it, and he has failed in proof. If your Lordships should think the point of importance, and that it would be fair to the pursuer to give him still a chance of proving it, it is probably a matter which could easily be ascertained, perhaps admitted. Speaking for myself, I should have no objection to this course; but if the case is left as it is, my judgment would be in favour of the appellants.

LORD BLANESBURGH. My Lords, the question under the Employers' Liability Act, 1880, which now alone remains to be considered by your Lordships—for I treat the point of pleading as having been in effect disposed of at the hearing of the appeal—cannot, to my mind, be answered with any certainty unless it be constantly borne in mind that this pit of the Auchengeich Colliery, the scene of the disastrous explosion on the morning of June 4, 1920, is what is called in mining parlance a "gassy mine" of a particular type.

The characteristics in this respect of the Auchengeich pit are, in the papers before the House, referred to in varying forms of description, any one of which I might select as sufficiently apt for my present purpose. The sheriff describes the pit as one in which naked lights are not used. The appellants, in their printed case, speak of it as one which has gas, that is to say inflammable gas, in it under normal

working conditions. The learned Sheriff Substitute, most aptly perhaps of all, says of it that the presence of gas in the mine—by which he, too, means inflammable gas—was its normal condition controlled but not removed by ventilation. I pause to observe—the circumstance being to my mind vital—that throughout this case we are, in relation to this issue, dealing with inflammable gas only as distinct from noxious or poisonous gas.

Now work in such a mine is not prohibited. It is allowed and even encouraged under conditions prescribed by Act of Parliament—the statute in force dealing with the subject being the Coal Mines Act, 1911.

And incidentally I may here observe that the sheriff has in this case found that the obligations imposed on the appellants by that statute, as at common law generally, were all in relation to this mine complied with by them. In the opinion of the sheriff, as the Lord President puts it, the employers have acquitted themselves of their responsibility under the statute, and the case before your Lordships so far proceeds, as it did in the Inner House, on the assumption that the sheriff rightly so held.

Here, therefore, we have a mine in which the presence of inflammable gas was a normal condition and with reference to which the appellants are found to have discharged all their obligations in respect of ventilation, organization, equipment, and conduct, as prescribed at common law in that behalf. It is in regard to such a mine that the sheriff propounds the question which the House is now required to answer, whether the presence of such gas at the working constituted a defect in the ways and works connected with or used in the business of the appellants in the sense of s. 1, sub-s. 1, of that general statute, the Employers' Liability Act, 1880.

Stated in the unqualified terms in which it is phrased by the sheriff the question, my Lords, would appear to admit only of one, and that a negative, answer. The presence of inflammable gas in this mine, at least to some extent, so far from being a defect, is a permitted attribute of the mine. Its presence, it is true, for extrinsic reasons to which I shall

H. L. (Sc.) 1924 JAMES NIMMO & CO. v. CONNELL. Lord Blanesburgh.

later allude, may make the mine more hazardous to work than one from which gas is absent. But the mere presence of inflammable gas in such a mine cannot, to my mind, of itself constitute in any proper sense of that word a defect in its ways or works. To say that it does would be equivalent to saying that every gassy mine is in this connection only a mine with a defect in it. But the contrary is, I think, very clearly the true view. Gassy mines are a well-known class of mine. So soon as a mine is recognized to be gassy, special precautions for the safety of the workers become imperative. Particular care must be taken with regard to ventilation, open lights must not be used, safety lamps must be supplied, and the introduction of lucifer matches, and the like, must be absolutely banned. With all these safeguards duly provided and observed, a gassy mine is no more defective than is a non-gassy mine where they are not necessary. So safeguarded, the presence of inflammable gas need not be either harmful or dangerous to the health of the men employed in the mine, who, indeed, as apparently was the case here, may remain quite unconscious even that it is there. The difference between a gassy mine so equipped and organized and another mine is really this, that in a gassy mine there is always the risk of mischance due to the fallibility of human nature or to the carelessness or neglect or wickedness of man, as a result of which the safeguards provided may be misused or the regulations made be broken or disobeyed. But the existence of such a risk cannot, in my judgment, be properly described as a defect in the condition either of the mine or its ways or works in the sense in which that word is used in the statute. Unless you can say of inflammable gas in a mine so safeguarded, that its mere presence, from its first moment, constitutes a defect in ways or works you cannot, to my mind, describe it as of itself a defect within the meaning of the Act, and so much I think you cannot say. To the question, therefore, in its absolute form, the answer must, in my opinion, be in the negative.

But although the question is put by the sheriff in a form

absolute, it should, I do not doubt, be read in connection with the accompanying case, and in particular with para. 11 in which the sheriff states his finding to be that at the time of the explosion in the mine the ventilation provided failed to dilute and render harmless inflammable gas to such an extent as to make the working place in the vicinity of the top of the heading fit for working.

Now, my Lords, before it can be ascertained whether the presence of gas in the mine to the extent here indicated by the sheriff constituted a defect within the meaning of the statute, it is necessary to discover, if one can do so, from the stated case and the sheriff's interlocutor, what were the actual conditions which these words are used to describe. It is, I think, unfortunate that they were chosen to describe anything. They are the words of s. 29 of the Coal Mines Act of 1911, selected, apparently, upon the view that a state of things which under that Act persons in the position of the appellants are only under a qualified obligation to prevent may, without more, be regarded as a defect within the meaning of a general Act passed over thirty years before and in respect of which their liability is unqualified. I am not prepared in unqualified terms to subscribe to that view, and, if para. 11 of the case is in any way based upon it, it becomes, I think, all the more necessary to get, if it be possible, at the actual conditions which the words of that para. 11 are selected to describe. And fortunately a reference to the case and the interlocutor of the sheriff makes it, I think, quite clear what the actual conditions as found by him were.

As to gas, his finding was that in the mine at the place and time of explosion inflammable gas had accumulated in such density that when brought into contact with a naked light it exploded. But when he finds that the inflammable gas was not diluted to such an extent as to make the working place in the vicinity of the top of the heading fit for working, does he mean that the gas remained so undiluted that, not only did it explode but that its presence was, albeit in a lesser degree, harmful or injurious to the health of the workers in the heading, as in the case of *Butler or Black* v. *Fife*

H. L. (Sc.) 1924 JAMES NIMMO & Co. v. CONNELL. Lord Blanesburgh.

Coal Co.(1) ? If such be his meaning, the view I take of this question would be different from that which I am now expressing. But that that is not his meaning is, as I think, quite plainly shown by his interlocutor.

There it appears that in the sheriff's opinion the fact that gas was present was unknown to the respondent. Had the sheriff thought otherwise on that point, he could not, I think, have refused to the appellants, as he did, the opportunity of showing that such knowledge on the part of the respondent was or might be under s. 2, sub-s. 3, a complete answer to any claim by him under s. 1, sub-s. 1, of the Act ; nor could he have omitted to consider the effect on the respondent's claim in that event of s. 67, sub-s. 4, of the Act of 1911. But, further, the statement of the sheriff in para. 15 of the case, that it was a reasonable inference that if the foreman had fulfilled his duty in regard to inspection he would have discovered that there was a dangerous accumulation of gas, imports, I think, clearly enough, that in the sheriff's view the presence of gas before the explosion was neither known to, nor appreciated, nor felt by any one concerned.

The finding, therefore, stated in para. 11 of the case, amounts, in my view, to no more than this, that there was present in this gassy mine at the time of the explosion an accumulation of gas which, although not otherwise deleterious or harmful to health, did ignite when brought into contact with an open light. The real question accordingly, as I see it, is whether the presence of inflammable gas to that extent in a gassy mine where an open light is prohibited and unnecessary is a defect within the meaning of the statute.

Here, again, my Lords, the answer must, I think, be in the negative. A gassy mine, gassed to that extent, may, in the way I have described, and as this case shows, be more dangerous than another in which there is no gas. But it is not, I think, for that reason alone defective any more than would a ship be defective merely because through the negligent opening of her portholes she is under risk of being sunk by the inrush of the sea.

(1) [1912] A. C. 149.

And so far as the sheriff himself is concerned, I doubt whether he would have decided that the presence of this gas here was such a defect had he not, as I very respectfully conceive, misapprehended the true effect of *Butler or Black* v. *Fife Coal Co.* (1), which apparently suggested this conclusion to him and which he intimated to the parties was in the Court of Session a decision that might justify the view he ultimately took.

With reference to that case, it has first to be observed that the only decision on the Employers' Liability Act, 1880, was based not on s. 1, sub-s. 1, but on s. 1, sub-s. 2. No one seems to have thought that s. 1, sub-s. 1, covered even so fatal a state of things as was there disclosed. Speaking, however, for myself, I should be of opinion that s. 1, sub-s. 1, was also there applicable, and that the ways and works of the mine then in question were clearly defective within the meaning of that sub-section.

But, my Lords, the distinction between *Black's Case* (1) and the present is, I suggest, fundamental. The ways and works in that case were pervaded not by inflammable gas, against the potential dangers of which precautions had been effectively taken and safeguards provided. They were pervaded by noxious gases, against which no such safeguards were either existent or indeed possible. The gas was carbon monoxide, so poisonous, as described by Lord Kinnear in this House, that the presence of a very small quantity of it in the atmosphere would cause death; difficult, moreover, to detect except by its effect upon the system, since it has neither colour, taste, nor smell. It was an escape of poisonous gas of that description into the workings of the mine which caused the death of the pursuer's husband.

Now, as I have already indicated, I should not myself hesitate to say that the presence of such a gas as that in the ways and works of a mine was a defect in their condition in the strictest sense; it was a defect so great as to make them death traps for human beings. But the whole point is missed, as it seems to me, if it is sought to apply the decision in

(1) [1912] A. C. 149.

H. L. (Sc.) 1924 JAMES NIMMO & Co. v. CONNELL. Lord Blanesburgh.

Black's Case (1) to a case like this, where the gas present, otherwise innocuous, is inflammable only when exposed to a naked light, the introduction of which into the mine is prohibited and unauthorized and unnecessary—where, too, the explosion, as the sheriff substitute phrases it, was brought about by the application to the gas of flame from a coal cutter, which in turn escaped owing to the carelessness of the men in charge of the machine, for whose carelessness as between the respondent and the appellants the appellants are in these proceedings not responsible. To such a state of things the case of *Black* (1) has, I think, no application, and no other authority nearer to the present in this aspect of it has been cited.

I am of opinion accordingly, as I have said, that the answer to the second question in the stated case should be in the negative.

Having reached that conclusion on the grounds I have given, I find it unnecessary to consider the case from the point of view from which it has been approached by my noble and learned friend opposite (Lord Phillimore). I should wish, however, very respectfully to say that I concur with him as to the principle he extracts from the authorities to which he refers.

One word further. I should have been sorry if the conclusion at which I have arrived had carried with it the consequence that the respondent was entitled to no compensation in respect of this accident. But that would not have been so. This case is one of several pending actions arising out of this explosion. It has been selected as the leading case, and by arrangement the others have been sisted pending its determination. To this fact is probably due the extreme elaboration both of evidence and argument with which it has been sought to establish liability against the appellants both at common law and under the Employers' Liability Act, 1880, because liability under the Workmen's Compensation Act, 1906, has always been admitted by the appellants and the modified damages awarded by the sheriff under the

(1) [1912] A. C. 149.

Employers' Liability Act, 1880, hardly seem adequate to the trouble taken to obtain them. To allow this appeal would in no way preclude the respondent, if so minded, from raising before the sheriff other points on the Employers' Liability Act, 1880, with which in the view he took of the case the sheriff has not hitherto considered it necessary to deal; nor would it preclude him from applying to the Court of Session to review the decision of the sheriff against him as to the liability of the appellants at common law; nor would it deprive him of his right in the last resort to compensation under the Workmen's Compensation Act, 1906, the amount of which is in most cases sufficiently adequate when compared with the damages recoverable under the Employers' Liability Act, 1880, to make actions under that Act now practically non-existent.

This appeal deals only with one ground of liability under that statute.

My Lords, I am for allowing it.

LORD DUNEDIN. My Lords, I have had the advantage of perusing the opinions which have been delivered by my noble and learned friends Lords Atkinson and Shaw, and, as they entirely cover all that I should for myself have wished to say, I was prepared merely to express my concurrence; but as there has been a difference of opinion I feel I ought to add a few words. Now, first, it seems to me that a "way" cannot be taken to be the ground on which you tread, or the walls between which you pass, or the roof which in an underground way is above your head. It includes the whole space which you use as a way, and therefore, agreeing with Lord Atkinson, I look upon the dictum of Stephen J. in *McGiffin* v. *Palmer's Shipbuilding and Iron Co.* (1) as wrong. I also agree specially with his criticism of *Willetts* v. *Watt & Co.* (2), which I think he shows is not really borne out by the judgment of Lopes and Lindley L.JJ. in *Walsh* v. *Whiteley*. (3) Further, I agree with Lord Shaw in thinking that the opinion

(1) 10 Q. B. D. 5. (2) [1892] 2 Q. B. 92.
(3) 21 Q. B. D. 371.

H. L. (Sc.) 1924 JAMES NIMMO & Co. v. CONNELL. Lord Dunedin.

in *Black's Case* (1) rules the question in this case. With great deference to the noble and learned Lord who has just preceded me, I cannot myself draw any distinction between a poisonous gas such as carbon monoxide and an inflammable gas allowed to remain in such quantities as to become explosive if a light is applied to it. It is true that the carbon monoxide is fatal at once, while the inflammable gas needs the further step of a light being applied. But light may be applied by accident or carelessness, and the fault in the condition of the way to my thinking is that the gas had been allowed to accumulate to such an extent that explosion could result. This accumulation was due to the negligence of the fireman. For that negligence the owner would not have been responsible at common law, but, inasmuch as that negligence resulted in effectuating a dangerous condition in a "way," he became liable under the precise provision of the section.

Interlocutor of the First Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, March 21, 1924.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Glasgow, and W. B. Ranking & Nimmo, W.S., Edinburgh.*

Agents for the respondent: *Deacon & Co., for Hay, Cassels & Frame, Writers, Hamilton, and Simpson & Marwick W.S., Edinburgh.*

(1) [1912] A. C. 149.

[HOUSE OF LORDS.]

GERALD McDONALD AND COMPANY . APPELLANTS;

AND

NASH AND COMPANY . . . . . RESPONDENTS.

H. L. (E.)*
1924
March 21.

Bill of Exchange—Indorsement—Delivery to Drawer—Subsequent Indorsement by Drawer—Drawer's Right against Indorser—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 20, 29, 56.

In May, 1920, the appellants sold to A. & Co. 19,000 cases of tinned soup at the price of 10*s.* per case, cash against delivery order. A. & Co., being unable to find the money, applied for financial assistance to the respondents, who undertook as between themselves and A. & Co. to find 75 per cent. of the money, there being then about 16,000 cases which had not been taken up. On August 10, 1920, at a meeting between the appellants, the respondents and A. & Co., it was agreed that the respondents should indorse a series of eight bills of exchange, seven for 1000*l.* each and one for 117*l.* odd, to be drawn by the appellants on A. & Co. payable six months after date to the appellants' order, and that the appellants, in consideration of the bills being duly indorsed by the respondents, should hand to the respondents delivery orders for the balance of the cases. These bills were at once drawn by the appellants on A. & Co., expressed to be payable to the appellants' order, and were accepted by A. & Co. and indorsed by the respondents. Room was left above the name of the respondents for the indorsement of the name of any person to whom the appellants should direct payment. The respondents then handed the bills to the appellants in exchange for the delivery orders. One bill having been discharged, the appellants shortly before the remaining bills became due indorsed their name as payees on the bills above the respondents' signature. The appellants duly presented the bills to A. & Co., who dishonoured them. They then gave notice of dishonour and claimed payment from the respondents, who denied liability.

In an action by the appellants to recover the amount of the bills against the respondents as indorsers:—

Held, (1.) on the facts that the respondents must be taken to have intended to make themselves liable to the appellants on the bills; (2.) that the bills, when handed to the appellants, were wanting in a material particular within the meaning of s. 20 of the Bills of Exchange Act, 1882, by reason of the absence of any indorsement by the appellants above the signature of the respondents, and that the appellants had implied authority to fill in their name as payees, as they did, over the name of the respondents; and that, when so filled up, the bills became retrospectively enforceable.

Steele v. *M'Kinlay* (1880) 5 App. Cas. 754 distinguished.

Glenie v. *Bruce Smith* [1908] 1 K. B. 263 and *In re Gooch* [1921] 2 K. B. 593 applied.

Decision of the Court of Appeal reversed

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* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

H. L. (E.) 1924

GERALD McDONALD & Co. v. NASH & Co.

APPEAL from an order of the Court of Appeal reversing a judgment of Rowlatt J. in favour of the appellants, the plaintiffs in the action.

The appellants' claim in the action was against the respondents as indorsers of seven bills of exchange each for 1000*l.*, and one bill of exchange for 117*l.* 6*s.* 4*d.*, all dated August 4, 1920, payable six months after date, the bills having been duly presented and dishonoured, and the respondents having had notice of such dishonour.

The substantial question involved in the appeal was whether the respondents indorsed the bills in such circumstances or at such times as to render them liable to the appellants, who drew the bills to their own order and some months after the indorsement of the respondents' name thereon indorsed the bills with their own name above the respondents' signature.

Rowlatt J. came to the conclusion of fact that the bills were indorsed by the respondents and handed by them to the appellants for the very purpose of making themselves liable upon them to the appellants, and held that the authority which the respondents gave to treat the bills as making themselves liable carried with it authority in law to do what was necessary in point of law to effect that purpose. He therefore gave judgment for the appellants.

The Court of Appeal by a majority (Bankes and Atkin L.JJ.; Scrutton L.J. dissenting) reversed the judgment of Rowlatt J. and directed that judgment should be entered for the defendants (the present respondents). The majority differed from the learned judge on the facts and came to the conclusion that the respondents indorsed the bills, not for the purpose of making themselves liable upon them to the appellants, but only for the purpose of enabling the appellants to discount them

The facts are fully stated by the Lord Chancellor in his judgment and are summarized in the headnote.

1923. Nov. 9, 12, 13, 20. *R. A. Wright K.C.* (with him *Le Quesne*) for the appellants. The true nature of the

transaction was that in consideration of the appellants immediately handing over to the respondents delivery orders for the whole of the goods the respondents should make themselves liable to the appellants on the bills, and with that object should back the bills. The respondents, as part of the transaction, gave authority to the appellants to indorse their name on the bills above the signature of the respondents in order to complete the bills. Alternatively, by s. 20 of the Bills of Exchange Act, the appellants had authority to complete the bills, as they ultimately did. Further, the respondents are precluded by s. 55, sub-s. 2 (*c*), from denying to the appellants that the latter were holders in due course or that they had authority to deal with the bills so as to make the respondents liable to them thereon.

Schiller K.C. and *J. B. Melville* for the respondents. In the form in which these bills were drawn and in the way in which they were handled it was legally impossible to render the respondents liable to the appellants as holders. Nor was this the intention of the parties. The real object of getting the respondents to put their name on the bills was to enable the appellants to discount them. Assuming that the intention of the parties was to make the respondents liable to the appellants on the bills, they did not adopt the machinery by which that could be done. The respondents were not indorsers of the bills, because the bills were not then in a negotiable condition, and the appellants were not holders in due course, because the bills were never issued and never negotiated. Where the drawee and the payee are the same person there is no issue of the bill. A bill is negotiated when it is delivered by one person to another. Negotiation means indorsement plus delivery. Sect. 20 of the Bills of Exchange Act, 1882, does not apply, because these bills were complete and regular. In effect they were bills payable to the drawers or their order; they might have been presented for payment without indorsement. They were perfect bills, but were not in a negotiable condition.

Le Quesne replied.

H. L. (E.) 1924 GERALD McDONALD & Co. v. NASH & Co.

The following cases were cited : *Steele* v. *M'Kinlay* (1) ; *Wilkinson* v. *Unwin* (2) ; *Singer* v. *Elliott* (3) ; *Jenkins & Sons* v. *Coomber* (4) ; *France* v. *Clark* (5) ; *Decroix, Verley et Cie.* v. *Meyer & Co.* (6) ; *National Park Bank of New York* v. *Berggren* (7) ; *Britten* v. *Webb* (8) ; *Herdman* v. *Wheeler* (9) ; *Lloyds Bank* v. *Cooke* (10) ; *Glenie* v. *Bruce Smith* (11) ; *In re Gooch* (12) ; *Macdonald* v. *Whitfield* (13) ; *Mayer* v. *Jadis* (14) ; *Day* v. *Longhurst.* (15)

The House took time for consideration.

1924. March 21. VISCOUNT HALDANE L.C. My Lords, in the autumn of 1919 the appellants bought from the Government Disposal Board nearly 20,000 cases of Australian tinned soup. On May 18, 1920, they sold over 19,000 of these cases to a firm of William Archer & Co., Ld., at the price of 10*s.* per case, on the terms that a deposit of 500*l.* should be made (which was done), and for the rest cash to be paid against delivery order on May 31, 1920. Archer & Co. were unable to find the money required, and approached the respondents for financial assistance. As the result, it was agreed in July, 1920, that, by way of consideration for assisting Archer & Co., the respondents were to get from them bills for payment at the rate of 3*s.* a case for the whole of the cases which had not then been taken up, amounting to about 16,000 cases. If the appellants agreed, Archer & Co. were to give them a six months' bill for the whole of the price of the cases of soup not taken up under the contract of May 18. The respondents were to take up and pay for the cases in 1000 or 2000 case lots, and were, as between themselves and Archer & Co., to find 75 per cent. of the money required ; in

(1) 5 App. Cas. 754.
(2) (1881) 7 Q. B. D. 636.
(3) (1888) 4 Times L. R. 524.
(4) [1898] 2 Q. B. 168.
(5) (1884) 26 Ch. D. 257, 262.
(6) (1890) 25 Q. B. D. 343, 346; affirmed [1891] A. C. 520.
(7) (1914) 19 Com. Cas. 234, 237.
(8) (1824) 2 B. & C. 483.
(9) [1902] 1 K. B. 361.
(10) [1907] 1 K. B. 794.
(11) [1907] 2 K. B. 507 ; [1908] 1 K. B. 263.
(12) [1921] 2 K. B. 593.
(13) (1883) 8 App. Cas, 733, 744.
(14) (1833) 1 Moo. & R. 247.
(15) (1893) 62 L. J. (Ch.) 334.

other words, for every 1000*l.* found for the price, Archer & Co. were to pay the respondents 250*l.* As Archer & Co. drew on the cases taken up, they were to remit to the respondents cash at the rate of 10*s.* 6*d.* per case, against which the latter would issue delivery orders for the soup to the value received. On August 6 the appellants, before whom the agreement between Archer & Co. and the respondents had been brought, wrote to the respondents agreeing to accept it.

My Lords, on August 10, 1920, the appellants, the respondents and Archer & Co. met and made final arrangements for the delivery over and payment as regarded the cases. It was agreed that the respondents should indorse a series of eight bills, seven for 1000*l.* each, and one for 117*l.* 6*s.* 4*d.*, to be drawn by the appellants on Archer & Co., payable six months after date to the appellants' order, and that the appellants, in consideration of the bills being duly indorsed by the respondents, should hand to the latter delivery orders for the balance of the cases. These bills were at once drawn by the appellants on Archer & Co., expressed to be payable to the appellants' order, and were accepted by Archer & Co., indorsed by the respondents, and handed by the latter to the appellants. There was left sufficient room for the indorsement, if necessary, of the names of any persons to whom the appellants should direct payment, over those of the respondents. On receipt of the bills the appellants were to hand to the respondents in exchange the delivery orders. On August 18 the respondents took up 2000 cases and paid the appellants 1000*l.*, whereupon the latter returned to them one of the bills for that amount, discharged.

The respondents did not pay and so withdraw any of the remaining bills, and shortly before February 21, 1921, the date when they became payable, the appellants indorsed their names as payees on them, above the signature of the respondents. When the bills became due the appellants presented them for payment to Archer & Co., who dishonoured them. The appellants gave notice of dishonour and claimed payment from the respondents as indorsers.

H. L. (E.) 1924 GERALD McDONALD & Co. v. NASH & Co. Viscount Haldane L.C.

The respondents refused payment, and this action was brought against the respondents to recover the amount due on the bills, with interest.

My Lords, the action was tried before Rowlatt J. Various defences were raised. One was that the respondents had been induced by misrepresentation by the appellants to enter into the transaction. This was negatived by the learned judge after hearing the witnesses. It was also said that the indorsement (which was made by one of the respondents' firm) was not binding on the respondents' firm by reason of want of authority. This also was decided adversely to the respondents. Then it was said that the bills were only accommodation bills, and that the appellants could not sue them. The learned judge rejected this defence also. On appeal to the Court of Appeal none of these contentions were insisted on, but a point of law was pressed. It was said that the appellants could not recover, because the indorsement of the respondents was made before the name of the appellants had been written on the bills, which were to be payable to order of the appellants as drawers. Rowlatt J. held that it was proved that the appellants had the authority of the respondents to put the appellants' own name on them in the form they did. He considered, after weighing the testimony on both sides, that as the result of the evidence it was established that the bills were indorsed by the respondents and handed to the appellants for the very purpose of making the respondents, as indorsers, liable to pay the appellants.

My Lords, in the Court of Appeal the decision of Rowlatt J. was reversed by Bankes and Atkin L.JJ.; Scrutton L.J. dissenting. The latter took the same view as the judge who saw the witnesses and tried the case. He was of opinion that the respondents intended to render themselves liable to the appellants, and had not, as was agreed, put their names on the paper merely in order to enable the appellants to discount, in which case the liability would have been to third parties exclusively. Bankes and Atkin L.J J. took a different view of the facts. They

thought that as the result of the evidence the respondents had not authorized the appellants to indorse the bills so as to create a right of action against the respondents otherwise than one which would be the outcome of the negotiation of the bills to outside parties. If so, the drawers could not, on well-known principles, sue the indorsers.

My Lords, after considering the evidence, I am unable to think that the majority of the Court of Appeal were justified in overruling the conclusion of fact arrived at by Rowlatt J. I think, with the latter and with Scrutton L.J., that the respondents must be taken to have intended to make themselves liable to the appellants. I come to this conclusion as the result of a scrutiny of the documents and the evidence, and of the opinion as to credibility of the learned judge who saw the witnesses in the box. I believe that all of your Lordships agree with the view that his finding of fact was the true one, and that the majority in the Court of Appeal ought not to have disturbed it.

Still, even assuming this finding to prevail, there remains a question of law. The drawers wrote on the bills no names of payees till the bills became due, six months after they had been drawn, and subsequently to the respondents' indorsement. What happened was that the bills when drawn were sent to Archer & Co., to whom they were addressed, for acceptance. When Archer & Co. had accepted, they sent on the bills, in accordance with what had been agreed, to the respondents for indorsement. This indorsement was made by the latter in pursuance of the agreement on the terms of which the appellants had entered into the transaction. Under that agreement the respondents must be taken to have indorsed, so as to be liable to the appellants themselves. The respondents accordingly did indorse the bills. But it is said that the bills they indorsed were not complete or regular bills, inasmuch as the drawers had not written on them their own names as payees, and that it was only to their order that the bills were expressed to be payable at all. It is therefore contended that the appellants did not become, when they wrote their names on

H. L. (E.) 1924 — GERALD McDONALD & Co. v. NASH & Co. — Viscount Haldane L.C.

the backs of the bills, holders of them in due course within s. 29 of the Bills of Exchange Act, or even holders within the definition s. 2, since complete bills were not handed to them.

My Lords, this is a contention which I am unable to accept. Even by the law as it stood, apart from the code contained in the Bills of Exchange Act, I do not think it was a sound one, having regard to what had been agreed on between the parties. As Lord Watson said, in *Steele* v. *M'Kinlay* (1), a person who writes an indorsement with intent to become a party to a bill may be held, notwithstanding that he has not, and therefore cannot give, any right to its contents, to be subject, in a question with subsequent holders, to all the liabilities of a proper indorser. And s. 56 of the Act itself, which governs here, provides that where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course. This section appears to me to make him become liable as an indorser if, as here, he has intended to become so. As to the lack of the material particulars of the insertion by the drawers of the name of a payee, s. 20 of the Act in that event, in my view, enabled the drawers in the circumstances of the case to exercise the authority which the agreement conferred on them to secure the liability to themselves or other payees, of the respondents as indorsers. For the section provides that where a bill is wanting in any material particular the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit. It was, I think, in accordance with the meaning of the sections I have quoted, within the capacity of the appellants to exercise the power conferred by s. 20. I think that this was a material particular which there was authority to fill in. *Glenie* v. *Bruce Smith* (2), in the Court of Appeal, appears to me to lay down a principle which extends as far, and I think that case was rightly decided. *Gooch's Case* (3) was also decided on s. 20, and is to the same effect. As pointed out by Lord

(1) 5 App. Cas. 754, 782.
(2) [1907] 2 K. B. 507; (C. A.) [1908] 1 K. B. 263.
(3) [1921] 2 K. B. 593.

Sterndale in *Gooch's Case* (1), *Shaw & Co.* v. *Holland* (2) turned mainly on the absence of actual authority to the drawer to complete the bill, as well as on the absence of an agreement by the indorser to become liable.

But speaking for myself, I do not consider it necessary to resort to the authority given by s. 20, for it appears to me that the bills were, from the beginning, complete and regular on the face of them, and that the respondents took them for indorsement in consideration of value given to them under the provisions of the agreement, and for handing over to the appellants in due course under that agreement. It is true that the names of payees were not inserted by the drawers until after the indorsement by the respondents. But the bills were originally expressed to be payable to the order of his drawers.

My Lords, the bills being so drawn, I am unable to resist the conclusion that they must be read as payable to the drawers themselves, without another payee's name being written on them, if they chose to demand payment. Sect. 8, sub-s. 5, of the Act provides that where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option. As Lord Herschell observed in *Bank of England* v. *Vagliano* (3), we must take the language of a code such as this without inserting a limitation which is not to be found on it or indicated in it. I think, therefore, that from the first the bills in the present case were in law payable to the drawers themselves, if they chose to demand payment, and were therefore complete bills when the respondents indorsed them. No doubt the person paying would have asked for a receipt, and he might very likely have been given this in the form of an indorsement by way of receipt. He would not the less be likely to do this since s. 9 of the Finance Act, 1895, provides that the name of the payee written upon a draft or order is not to constitute a receipt chargeable with stamp

(1) [1921] 2 K. B. 593. (2) [1913] 2 K. B. 15.
(3) [1891] A. C. 107.

H. L. (E.) 1924 GERALD McDONALD & Co. v. NASH & Co. Viscount Haldane L.C.

duty. Such an indorsement operating by way of receipt only is nothing which the sub-section makes a novelty. In *Smith* v. *M'Clure* (1) Lord Ellenborough said in 1804 that "a bill payable to a man's own order was payable to himself, if he did not order it to be paid to any other." In *Keene* v. *Beard* (2) Byles J. laid it down in 1860 that "one of the best receipts is the placing on the back of the instrument the name of the person who has received payment of it. Such an entry of the name on the instrument is not an indorsement." Sect. 8, sub-s. 5, is accordingly declaratory of old law, which has been the law throughout, whatever may have been the cautious practice of bankers and others in asking for what resembles a responsible indorsement for reasons of convenience.

For these reasons I think that the judgment of Rowlatt J. was right and should be restored; and that the appellants should have their costs here and below.

LORD DUNEDIN. My Lords, the facts are already stated. There is a question of fact which must first be decided before we can consider the law of this case, and that is whether Nash, in putting his name on the bill, did intend to become liable to McDonald in all events. In company with, I believe, all of your Lordships and agreeing with Scrutton L.J. and Rowlatt J., I think he did. I have had the advantage of reading the judgment about to be delivered by Lord Atkinson, who has gone very fully into the correspondence and the evidence. I shall not duplicate what he says, but I can give my reasons for coming to the conclusion I do very shortly. Nash himself admits that he intended he should be liable to a third party if the bill were discounted. Now he must, on his own theory of the bargain as understood, have believed that in the event of his having to pay to a third party either he had recourse against McDonald or he had not. If he had not it would have been pure idiocy of McDonald to keep a piece of paper which would be worthless if he kept it rather than discount it when it was worth

(1) (1804) 5 East, 476. (2) (1860) 8 C. B. (N. S.) 372, 382.

the money. If he had, then I am asked to believe that McDonald was willing to part with control of the goods and Archer was content to be liable for 2000*l.* on what became a mere loan of the money for a few months. I refuse to believe it. In the Courts below that question of fact was held to determine the law; in other words, the fact of Nash's intention one way or the other brought the case under the category of *Wilkinson & Co.* v. *Unwin* (1) and other cases on the one hand or *Jenkins* v. *Coomber* (2) and other cases on the other. A complete list is given by Bankes L.J. in his judgment.

Before your Lordships, however, Mr. Schiller presented a very able and persistent argument that even upon the assumption that Nash did intend to become liable the parties had gone the wrong way about it, and that, standing the bill as it is, Nash was not liable. That would be an unfortunate result from the point of view of justice, though it may be the law. I am, however, glad to be of opinion that it is not. Counsel relied strongly on *Steele* v. *M'Kinlay*. (3) I do not think that that case affords any help, because there is no question that there was no explanation given as to with what purpose or in what manner M'Kinlay's name found itself on the back of the bill.

The appellant says that he can arrive at the desired liability in one of two ways—namely, that under s. 56 of the Bills of Exchange Act, the respondent, having signed the bill other than as drawer or acceptor, incurred the liabilities of an indorser to a holder in due course, and that the appellant was a holder in due course, as he was the holder who had taken a bill complete and regular upon the face of it in terms of s. 29. Failing that, the appellant says that he was entitled to do what he did under s. 20. My Lords, speaking for myself alone, I have not been able to convince myself that the bill was held by the appellant in due course in a question with Nash. It seems to me that he never really took the bill from Nash at all, as Nash never had any property in the

(1) 7 Q. B. D. 636. (2) [1898] 2 Q. B. 168.
(3) 5 App. Cas. 754.

H. L. (E.) 1924 GERALD McDONALD & Co. v. NASH & Co. Lord Dunedin.

bill and never held it, but merely put his name on it at the instigation of McDonald. But, on the other hand, I feel no doubt that s. 20 fits the case. It is admitted that if the indorsement by the drawer had stood upon the bill when Nash indorsed it, there would be no more to be said. Now, on the hypothesis that Nash intended to become liable, which we have found is a fact, then it seems to me that the second part of sub-s. 1 of s. 20 precisely applies; for ex hypothesi the material particular that is wanting is that very indorsation which was afterwards filled in, and this is done as conditioned by sub-s. 2 of s. 20 in accordance with the authority given. This view seems to me strictly in accordance with what was decided by the Court of Appeal in *Glenie* v. *Bruce Smith*. (1)

I, therefore, concur in the judgment proposed.

LORD ATKINSON. My Lords, the facts have been fully stated.

Bankes L.J. quotes in his judgment at some length a passage from the judgment of Lord Watson in *Macdonald* v. *Whitfield* (2), to the effect that the liabilities inter se of the successive indorsers of a bill or promissory note are, in the absence of all evidence to the contrary, determinable according to the law merchant; but may be modified by the agreement of those parties and by the facts and circumstances attending upon the making, issuing or transfer of the bill or note going to show what was the true relation to each other of the parties. That statement of the law is little more than an expansion of what the same noble Lord laid down in the case of *Steele* v. *M'Kinlay*. (3) He there said: "In some cases the precise character and consequent liabilities of parties to a bill are conclusively fixed by the tenor of the document. The person who draws a bill of exchange, and his addressee who accepts it, can never, according to the principles of the law merchant, be liable otherwise than in their respective characters of drawer and acceptor. In other

(1) [1908] 1 K. B. 263. (2) 8 App. Cas. 733, 744.
(3) 5 App. Cas. 754, 778.

cases the character and liability of parties to a bill cannot be ascertained without the aid of proof, as, for instance, when a dispute arises in regard to the order of time in which indorsements were made upon a bill. But such proof, when it is admissible, must be strictly limited to the facts and circumstances attendant upon the making, issue, or indorsement of the bill. On the other hand, it is undoubtedly competent for parties to a bill, by contract inter se, express or implied, to alter and even invert the positions and liabilities assigned to them by the law merchant. The drawer and acceptor of a bill may agree that, as between themselves, the acceptor shall have the rights of a drawer, and that the drawer shall be subject to the liabilities of an acceptor, and that agreement when proved will be binding upon them both, although it can have no effect upon the obligations to third parties interested in the bill imposed upon them by the law merchant."

Adopting those principles, the learned Lord Justice analysed the evidence with a view to determine what was in this case the nature of the contract expressed or implied (extrinsic to the bills sued on) which was entered into between the parties relatively to the indorsement of the bills by Nash. The conclusion at which he arrived was, as I understand it, in effect, this: Nash indorsed the several bills, not, however, on the terms that he should incur no liability whatever upon them, nor yet on the terms that he should be subject to all the liabilities the law merchant imposed, under ordinary circumstances, upon an indorser, but on the terms that his liability on the bills should be conditional upon the appellants discounting them, presumably at their, the appellants', own bank, so that if the appellants did discount the bills Nash, as indorser of them, might be required to pay them, but that if the appellants omitted to discount them Nash would be no more liable to pay to McDonald, Ld., anything in respect of any of them than if they were so much waste paper. At p. 293 of the Appendix the Lord Justice, in the course of his judgment, is reported to have expressed himself thus: "The conclusion

H. L. (E.) 1924 GERALD McDONALD & Co. v. NASH & Co. Lord Atkinson.

at which I have arrived in reference to this all-important interview (i.e., the interview between the parties on August 10, 1920) is that the question of the bills remaining in McDonald's possession until maturity was not in the contemplation of any of the parties, and consequently the question of the defendants' liability on their indorsement in the event of the plaintiffs retaining them till maturity was never considered and no agreement was come to on that question." But with all respect it did not require a special agreement between the parties, extrinsic to these bills, to entitle the appellants to retain them till maturity. The law merchant entitled them to do so and it would require a special agreement, not to give them, but to deprive them of, that privilege. Lower down the learned Lord Justice proceeds to add: "If I have correctly interpreted the result of the interview of August 10, coupled with the Memo. of July 29, I think the plaintiffs fail in making out any agreement that the defendants should be liable to the plaintiffs upon the bills or that under no circumstances were the plaintiffs not to be liable to the defendants on the bills, and I come to the conclusion that the defendants were entitled to succeed in the action and their appeal must be allowed."

Atkin L.J., at pp. 295–296 of the Appendix, is reported to have expressed himself thus: "We are brought, therefore, to the narrow question of fact. Did Nash authorize McDonald to indorse the bills so as to create a right of action in McDonald against Nash in the absence of negotiation of the bills, or did he only authorize McDonald to create a liability of Nash to a third party on negotiation of the bills? In other words, did he intend to be liable to McDonald or only to a third party? I was at first inclined to think the former inference was the right one, but my first impression was altered by Mr. Melville's careful survey of the facts and documents, and I have come to the conclusion that Nash never did intend to become liable to McDonald on the bills." I do not think I misinterpret the result of these judgments in saying that the Court of Appeal decided that Nash's liability to

McDonald on these bills was on the facts conditional on McDonald's discounting them. I have anxiously perused the evidence in the case, documentary and oral, more than once, and I find myself, with all respect, utterly unable to reach the conclusion at which the two learned Lords Justices have on this point arrived. I think it is improbable in itself, is inconsistent with the course of dealing pursued by the parties in reference to the adventure in which they became engaged, and is not supported by the evidence of Gerald James Walter McDonald upon which it purports to be based. I shall deal presently with the evidence touching the occurrences which took place on July 29, 1920, and on the following 10th of August respectively, but before doing so I may point out that if Nash's liability on the bills was subject to the condition mentioned, as it is now alleged to have been, then the appellants' omission to fulfil the condition and discount the bills was little less than idiotic. While McDonald & Co. abstained from discounting the bills they were trusting, so far as the bills were concerned, to be paid for the goods they had sold by the acceptance of an impecunious firm—Archer & Co.—not possessed of any adequate financial resources, and yet notwithstanding this they were furnishing Nash with delivery orders, enabling him and his firm to obtain possession of these very goods. These delivery orders were given from the very first. They were, by both parties, treated as being given, and were stated to have been given, as security to Nash. Yet, according to the assumption, Nash, the receiver, was under no liability whatever till the bills were discounted. Again, in the lengthy correspondence which passed between the parties from the month of July, 1920, to the month of April, 1921, not only is there no candid and clear statement made by Nash that his liability upon the bills was conditional on their being discounted, but with the possible exceptions hereafter mentioned, there is not the faintest allusion to anything of the kind. Various defences were, as I shall presently show, put forward, but not this. [His Lordship then entered into a detailed examination of the correspondence and the oral evidence, and in particular

H. L. (E.) 1924

GERALD McDONALD & Co. v. NASH & Co.

Lord Atkinson.

the evidence of Mr. Gerald McDonald, and he continued as follows:] There is no doubt an apparent contradiction between the witness's evidence in chief and his evidence on cross-examination touching what McDonald said to Nash about discounting the bills. This may be due to the form in which the questions were put. In the cross-examination he is asked did he tell Nash he wanted his indorsement only to enable him to discount the bill, whereas in examination in chief his answer was that the indorsement would be of great value to him and would enable him to negotiate the bills. The name of a solvent indorser on a bill accepted by a man without financial means always facilitates, I should think, the raising of money on the bills, especially if they have six months to run; but there is all the difference in the world between the drawer of a bill asking a person of known means to indorse it so that he can, if need be, discount it, and asking him to indorse it, on the terms that the indorser shall not be liable at all upon it unless the drawer does discount it. For the reason I have given I think it is on the evidence clearly established that it was definitely agreed between the appellants and the respondents Nash & Co. that bills should be drawn by McDonald for the price of the soup sold by him, that Archer & Co. should accept those bills, and that Nash & Co. should back those bills, which I presume means that Nash & Co. would become a party to them, so as to be liable to pay the amounts of them when due, on the default of the acceptor, to the party entitled to receive the money. Second, that the liability thus imposed on Nash & Co. was not by any agreement, express or implied, made conditional on the appellants discounting the bills or any of them. Third, that this agreement was never altered or varied, but continued in full force and effect up to the decision of the action before Rowlatt J.; and that the drawing of these bills by McDonald & Co., the acceptance of them by Archer & Co., the indorsement of them by Nash & Co., and the delivery of them so indorsed by Archer & Co., through Nash & Co., to the appellants were all things done by the respective parties with the intention and for the purpose of carrying

out and giving effect to the beforementioned agreement into which they all had entered. This conclusion is sustained by the fact that, on the delivery of the bills by Nash & Co. to the appellants, the latter handed over to them in exchange for the bills the delivery orders for all the soup for which the appellants had not been already paid.

The delivery of these delivery orders placed these goods under the absolute control of Nash & Co. It was so stipulated for in the agreement into which the parties had entered, but at the time the delivery was, in fact, made it was only explicable upon the ground that Archer & Co. and Nash & Co. had performed their respective sides of their contracts.

The case, therefore, is wholly different from the case of *Steele* v. *M'Kinlay*. (1) In that case there was no evidence produced to show why, in what character, for what purpose, or object, James McKinlay deceased, whose personal representative was sued, wrote his name across the back of the bill sued on. In this case the terms of the agreement entered into between the parties are clear. It is also clear that, by the things they did and the steps they took, they intended to perform, and thought they had performed that agreement. The delivery of the delivery orders shows that their objects and intentions were right and honest. Their only blunder consisted in doing the right things in the wrong chronological order. The bills were drawn by the appellants to their own order. The natural and proper thing to have done would have been for the appellants to have indorsed the bills so as to have named or indicated a payee, and that Nash & Co. should then have indorsed the bills. Had that been done no difficulty would have arisen. What the parties stupidly did was this: Archer & Co., after accepting the bills sent them to Nash & Co., who, instead of deferring their indorsement of them till the appellants had indorsed them, naming or indicating a payee, and then themselves indorsing the bills, indorsed the bills before the appellants had indorsed them, handed them over to the appellants, and got in exchange the delivery orders which they were not entitled to receive

(1) 5 App. Cas. 754.

H. L. (E.) 1924

GERALD McDONALD & Co. v. NASH & Co.

Lord Atkinson.

till the appellants' securities had been perfected. I think it is clear that Nash & Co., like the acceptors, intended to become liable on these bills when they indorsed them. Indeed, their case is that they did become liable upon them, but only conditionally upon the appellants discounting them. The appellants did not, in fact, indorse these bills till months later—February 26, 1921—when they did indorse them. They put their signature above that of Nash & Co. in a space left vacant for the purpose. The question remains then whether the appellants, being in possession of these bills on February 26, 1921, were, by the provisions of s. 20 of the Bills of Exchange Act, 1882, empowered to make them complete and enforceable against Nash & Co. by indorsing them at that date, in the manner in which they should have indorsed them—namely, in priority to the indorsement of them by the respondents—thus making the instruments effective to do what the parties to them desired and intended them to do in performance of the agreement into which those parties had entered. Sect. 20, sub-s. 1, provides that where a bill is wanting in any material particular the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit. Sub-s. 2 provides that in order that any such instrument may when completed be enforceable against any person who became a party to it prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time is on this subject a question of fact. Here the bills were indorsed by the appellants very shortly after they became due; that evidently was within a reasonable time. The first question to be determined upon the construction of this sub-s. 1 of s. 20 is this: Is absence of an indorsement by the drawers of a bill drawn simply to their order a "material particular"? Prima facie I should say it was, because the other parties, whether acceptors or indorsers, do not know till that has been done who are the persons to be paid. No doubt a drawer who draws a bill payable to his order may, under the provision of s. 8, sub-s. 5, of the same statute, at his option treat the bill as payable to "him

or his order." No time is mentioned within which this option must be exercised, or how it is to be exercised. It may well be that the indorsement of the bills by the appellants on February 26 was a clear exercise of their option not to treat these bills or seek to enforce them as bills payable to the drawers themselves or their order. Otherwise there would be no need of the indorsement so made.

The next question for decision is by no means an easy one. It is whether the amendment made by the drawers on February 26, 1921, was "strictly in accordance with the authority given," within the meaning of s. 20, sub-s. 2, in order that the bills might be enforceable against the respondents who became parties to them before February 26, 1921.

Archer & Co., by the agreement of the parties, were bound to accept these bills which, prima facie, means to validly accept them. Nash & Co. were, by the agreement of the three parties, bound to back those bills when accepted, which means to become a party to them in such a way as would make the bills legally enforceable against them in case the acceptors made default. Both Nash & Co. and Archer & Co., in my opinion, designed and intended to act in conformity with their contract in these respects. The appellants thought Nash & Co. had done so. They apparently also thought that they themselves had perfected the security for the price of the goods sold. The handing over of the delivery orders to the control of the respondents, if the bills were not perfected, would involve a gross wrong to the appellants.

To deny to the appellants the right and authority to indorse these bills, as they did indorse them on February 26, 1921, is in effect to confer upon the other parties to the bills the power to inflict a gross wrong upon the appellants; while to hold that the appellants had authority to indorse the bills as they have done merely enables them to compel the other parties to the bills to perform their respective agreements.

From all these facts and circumstances, I have come to the conclusion that the appellants had implied authority to make, on February 26, 1921, the amendment they did make in those bills, by indorsing them in order to carry out

H. L. (E.) 1924 GERALD McDONALD & Co. v. NASH & Co. Lord Atkinson.

their agreement so as to satisfy the requirements of s. 20, sub-s. 2, of the Bills of Exchange Act of 1882. This conclusion is supported by *Glenie* v. *Bruce Smith* (1), as well as by the case of *In re Gooch; Ex parte Judd* (2), and I therefore think that the decision appealed from was erroneous and should be reversed, that the judgment of Rowlatt J. should be restored and the appeal be allowed with costs.

LORD SUMNER (read by LORD DUNEDIN). My Lords, after carefully considering the evidence in this case I agree with the conclusion of Rowlatt J., who saw the witnesses, and of Scrutton L.J., as against that of the majority of the Lords Justices in the Court of Appeal. The defendants' actual indorsement was unrestricted and, if they were to be liable at all, presumably they were to be liable to all holders of the bill. Mr. F. J. Nash deposed to statements made to him by the plaintiffs, that liability was only to arise to third parties with whom the bills might be discounted; in other words, that Messrs. Nash & Co. were to indorse for the accommodation of the plaintiffs, but no further. This Rowlatt J. did not believe. I appreciate that the evidence of Mr. G. J. W. McDonald was taken in a manner which hardly did full justice to his case, but this is not sufficient to negative what I conceive to be the business of the whole transaction. Messrs. Archer & Co. needed to be accommodated; Messrs. McDonald & Co. did not. They wanted to be paid, and Messrs. Archer & Co. could not pay. They gave Messrs. Nash & Co. delivery orders for the soup in exchange for their indorsements on the bills, and they must, in my opinion, have expected that Messrs. Nash & Co. would be liable to them for payment of the bills at maturity. This must have been the intention of Mr. F. J. Nash also. To give Messrs. Nash & Co. control of the goods on the terms that, if the bills were discounted and Messrs. Nash & Co. were made to pay them, Messrs. McDonald & Co. should be liable to reimburse Messrs. Nash & Co. and should then look to Messrs. Archer & Co. for their money, is something that I

(1) [1907] 2 K. B. 507; [1908] 1 K. B. 263. (2) [1921] 2 K. B. 593.

cannot understand. It was only because Messrs. Archer & Co. were not good for the money that Messrs. Nash & Co. were brought in at all, and, if this was to be the result, the plaintiffs would have been better off if they had never known Messrs. Nash & Co. in the matter. The proper inference from the facts is, that it was the common intention, both of the plaintiffs and of the defendants, that the latter should be directly liable to the former on the bills, so far as the law allowed. If Mr. F. J. Nash had any less intention, his conduct was dishonest, and of this I have no mind to suspect him.

What, then, does the law allow in the matter? Mr. F. J. Nash wrote his firm's name on the back of bills, duly drawn by the plaintiffs on Messrs. Archer & Co., and duly accepted by Messrs. Archer & Co., payable to the plaintiffs' order; but when the name "F. J. Nash for Nash & Co." was thus written, Messrs. McDonald & Co. had not yet indorsed the bills. What is the legal effect of that?

After Mr. F. J. Nash had written this indorsement on the bills, he gave them back to Mr. G. J. W. McDonald, pursuant to the arrangement, which I am satisfied had already been made and was fully understood. He gave them back in exchange for and in consideration of delivery orders for the soup, and the plaintiffs have had or held them ever since. Unless there is some decision or some principle which binds me to say the contrary, I think that on these facts I ought to hold that the bills thus delivered to the plaintiffs were "wanting in a material particular"—namely, that they lacked the signature of the plaintiffs written on the back before that of Messrs. Nash & Co. by way of a general direction to the acceptors to pay any person to whom the bills might thereafter have been delivered, except in so far as this liability might be specially modified inter partes.

The questions are: (1.) whether this description of the bill is legally incompetent or incorrect within s. 20, sub-s. 1, of the Bills of Exchange Act, 1882, or otherwise; and (2.) what legal result, if any, follows from this description being true in the circumstances of this case.

The section says "a bill," and I am of opinion that each

H. L. (E.) 1924 GERALD McDONALD & Co. v. NASH & Co. Lord Sumner.

of these instruments was a bill, when it was passed to Mr. F. J. Nash to be indorsed, and was still a bill and the same bill, when he redelivered it to Mr. G. J. W. McDonald, after writing on the back of it. Doubtless, it might have been treated as a complete bill within the statute before it reached the hands of Mr. Nash, but it did not cease to be a bill by becoming an indorsed bill, nor can I find any authority for saying that the new rights, which arise upon the indorsement of a bill, prevent the whole instrument—drawing, acceptance and indorsements, such as they are—from being properly describable as a bill and dealt with as one instrument together. *Hirschfeld* v. *Smith* (1) is an instance to the contrary, where an alteration in an indorsement avoided the bill, as being a material alteration in the bill.

If so, these bills were wanting in a material particular, for the gap between the acceptance, unindorsed by the payee, and the actual first writing of another name—namely, that of Messrs. Nash & Co.—on the back is a want, which is certainly material. The respondents do not dispute that what was wanting was material, but they say that the lack of it was fatal.

The section then says that, in these circumstances, the person in possession of the bills, who indubitably was Mr. G. J. W. McDonald, had prima facie authority to fill up the omission as he chose, that is, as he did. The way in which it was actually filled up certainly was in accordance with the common interests of the parties in so far as it had efficacy in making the defendants liable to the plaintiffs, and thus the authority, which was only a prima facie authority by the statute, is not in any respect contradicted or varied by the facts.

Then comes the question what, if any, is the efficacy of the plaintiffs' act in filling in their names above those of Messrs. Nash & Co. on a later date ?

As I understand the contention, it is, that in this case it has no efficacy, for, firstly, in no case could s. 20 authorize a retrospective operation or enable the filling in of the blank

(1) (1866) L. R. 1 C. P. 340.

to confer rights not previously existing and, secondly, no rights did previously exist against Messrs. Nash & Co., for, although Mr. F. J. Nash wrote their name as indorsers, they were not and could not be indorsers, since nobody entitled to do so had indorsed to them and so entitled them to indorse to others in their turn. Both propositions are said to be inherent in the nature of bills of exchange.

My Lords, I think it is reasonably plain upon the language of s. 20, that filling in an omission in a bill under a proper authority to do so makes a bill complete and thereupon enforceable, which without it could not have been enforced. This is involved in the provision that, if filled in within a reasonable time, the completed instrument becomes enforceable against any person, who became a party to it before its completion, and without limit of time in favour of a holder in due course, to whom it is negotiated after completion. It is, indeed, involved in the idea of completing by a subsequent act a bill, which was incomplete before it, that the result of completion is to be the same as if the bill had never been defective at all, and to limit its efficacy to rights, which only come into existence after the omission is supplied, deprives the section by mere implication of half its beneficial effect.

As it seems to me, the language of s. 20 contemplates the very case with which we are now dealing. The prima facie authority, which it gives, is, in the case of delivery of a simple signature on a blank stamped paper, an authority "to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer or the acceptor or an indorser." If, then, the signature is used for that of an indorser, we get in an extreme form the case of an indorser's name operating to charge him as indorser, although, when he wrote his name, not only had nothing been transferred to him which he could transfer in turn by indorsing and delivering the bill, but no draft, no acceptance, and no order by the drawer, general or special, was in existence at all. The whole efficacy of the indorsement is retrospective, and is dependent on the subsequent action of

H. L. (E.) 1924 GERALD McDONALD & Co. v. NASH & Co. Lord Sumner.

a person who, according as he fills up the blank in one way or another, can make the person who has thus given his signature, either the transferee of rights, which he subsequently passes on as transferor, or, at his choice, an acceptor, who has no right to transfer, but is under an ambulatory liability to all other parties, who may come upon the bill. If, as I think is plain, this is the effect of the first part of the single sentence, of which sub-s. 1 consists, I do not see how a more restricted interpretation can be placed on the other part, so that the words " in like manner . . . . has a prima facie authority to fill up the omission in any way he thinks fit," can be limited so as to exclude indorsees. No doubt the authority, being prima facie only, is limited by circumstances that may be proved, and these may narrow in some cases (*Shaw & Co.* v. *Holland* (1)) the authority, which otherwise would be general: *Glenie's Case* (2); *Gooch's Case* (3), but in either case indorsees must be within the principle of the sub-section.

I think further that the language of sub-s. 2 points to the same conclusion. It expresses a condition of general application to all the cases covered by sub-s. 1, and says that " in order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time." A bill, on which the signature to a blank is utilized as an indorser's signature, is such an instrument. A bill, complete on its face, but purporting to be indorsed by a third party without that party's name being preceded by the indorsement of the drawer, is another such instrument. In both cases the bill is incomplete till it is filled up in one way or the other, and when so filled up, though not before, it becomes retrospectively enforceable, as if it had been complete throughout. That the filling up was done in the present case within a reasonable time has not been contested, at your Lordships' Bar.

It is, however, argued, as I understand the matter that,

(1) [1913] 2 K. B. 15. (2) [1908] 1 K. B. 263.
(3) [1921] 2 K. B. 593.

as the Bills of Exchange Act, 1882, is a codifying Act, it ought, unless this be impossible on its language, to be construed so as not to alter the principles of the law merchant as applied in the decisions of the Courts before the Act passed, and it is further said that, both on principle and on the cases, a name written on the back of a bill, as Messrs. Nash & Co.'s name was written here, cannot be turned into their indorsement, so as to make them liable on the bill as indorsees to a subsequent holder for value, otherwise than by estoppel, which does not arise between parties who know all the facts. It was said that there was no decision to the contrary and that there were dicta at least to be found in support of the proposition. The principle alleged, deep rooted in the nature of a bill of exchange, is this. He who becomes liable as indorser of a bill is liable, because he transfers to a holder by subsequent delivery his rights on the bill with the addition of his own credit as indorser, and he cannot do this unless he then has rights on the bill, which he can transfer, and unless he is not only an indorser but also an indorsee himself, to whom, in any valid form, the bill or the rights upon it have been transferred by prior indorsement. No collateral agreement, no subsequent authority, can avail to transmit at the time of the delivery of the bill a right on the bill, which has not yet been regularly acquired on the bill, and, if no right on the bill can be transferred neither can any liability on the bill be created. The liability, if any, must arise on the collateral agreement or by estoppel, but not simply on the bill. Such, in my apprehension of it, was the argument.

It is evident that this is a principle of rigid legitimacy, founded on the assumption of an indispensable ritual of transmissibility in time as well as in form, and that, if it is a principle at all and not a mere observance, it is quite inconsistent with any effectual admission of amendments to cure the errors and to carry out the intentions of the parties to the bill. Yet it is beyond doubt that the law merchant has long admitted the making of amendments by filling in blanks so as to bring about the formal regularity of the bill and

H. L. (E.) 1924 GERALD McDONALD & Co. v. NASH & Co. Lord Sumner.

its indorsements. Such a principle would be equally fatal to filling in omissions from the face of the bill as to filling in omissions from the back, and decisions relating to the former class of cases ought to conform to this principle just as much as those which relate to the back. If such a principle is inherent in the law of bills of exchange, I think that *Glenie* v. *Bruce Smith* (1) ought to have been otherwise decided. Neither *Steele* v. *M'Kinlay* (2) nor *Macdonald* v. *Whitfield* (3), though strongly relied on by the respondents, are really authorities for this doctrine. In the former case the facts did not raise any question of authority to fill in blanks in an incomplete bill, and there was no evidence to show what the past arrangement between the parties had been. Liability to the drawer had to be rested on the bare fact that James M'Kinlay had written his name on the back above the drawer's name and before the drawer's name was written. What was held was that, though M'Kinlay was an indorser both in fact and in law and might in a question with subsequent holders be subject to all the liabilities of a proper indorser, he could not thus be interpolated as a party between drawer and acceptor. There is nothing here to touch the case of an indorser, who by arrangement and in order to make himself liable to the drawer, writes his name as indorser first, and for convenience leaves the drawer to write his name higher up, afterwards. On the other hand, *Macdonald* v. *Whitfield* (3) is a case where the true liability of indorsers, who all indorse on the same occasion without any subsequent filling in of blanks, is held to depend on the actual agreement between them and not on the mere ritual observed in putting their hands to paper.

On the other hand I think there is authority, which though old, is an answer to the respondent's argument. In *Russel* v. *Langstaffe* (4) one G. had procured the defendant to write his name on the back of an engraved blank form of a promissory note without either date or amount or time of payment. G. then filled in these particulars and signed the form as

(1) [1908] 1 K. B. 263.
(2) 5 App. Cas. 754.
(3) 8 App. Cas. 733.
(4) (1780) 2 Doug. 514.

maker of the note and discounted it with the plaintiff, who had knowledge of these facts. The first point taken in banco was that, at the time of the indorsement, no note had been made at all, and no subsequent act on the part of G. could alter the original nature or operation of the defendant's signature which, when written, was a mere nullity. This point the Attorney-General, counsel for the defendant, gave up, but Lee, who was with him, "thought it of consequence enough to be argued. It never had been determined." The argument is thus reported: "An indorsement supposes a bill, or promissory note, then actually existing; and if a party take an indorsed bill, or note, knowing, at the time, that it was not the subject of an indorsement when the name was written on the back of it, he is not injured if he is afterwards told that he shall not be permitted to treat it as a bill or note." To this contention, which seems to me hard to distinguish, except in its brevity, from that of the respondents, Lord Mansfield observed still more briefly: "There is nothing so clear as the first point. . . . . It does not lie in his mouth to say, the indorsements were not regular," and so the defendant failed. This decision is afterwards referred to as being undoubted law by Buller J. in *Lickbarrow* v. *Mason*. (1) In *Schultz* v. *Astley* (2) the same point appears to have been taken again. The defendant accepted in blank on a piece of stamped paper. One Clissold then wrote his name, where a drawer and where an indorser would sign. Later on some other person filled in words or particulars, which made the instrument a complete bill. Schultz sued Astley on the note, and among other points taken for the defendant there is this: "As an indorser cannot transfer unless the matter to be transferred be in existence, Clissold's indorsement before the bill was drawn in effect transferred nothing to the plaintiff." In giving the judgment of the Court for the plaintiff, Tindal C.J. does not even mention this contention, but says more generally: "The objection is . . . . that this giving of a blank acceptance, authorizes only the party to whom it is given to draw the bill; or at all

(1) (1793) 6 East, 20n, 22n. (2) (1836) 2 Bing. N. C. 544, 548, 552.

H. L. (E.) 1924 GERALD McDONALD & Co. v. NASH & Co. Lord Sumner.

events does not authorize Clissold, a stranger, to sign his name on the same blank piece of paper as drawer. . . . . No authority has been cited to us for any such restriction of the general doctrine," that a party may be bound by his acceptance on a blank paper, so far as the stamp will cover it.

My Lords, for these reasons I think that the appeal should be allowed. Speaking for myself only and always with great deference, I should not be prepared to say that this bill was a complete bill before ever Mr. Nash wrote his firm's name on the back of it, so that s. 20 need not be prayed in aid at all. Sect. 8, sub-s. 5, merely enables the drawer of a bill in the form—" pay to our order "—to demand payment and give a receipt for it, as well as the person to whom, specially or generally, it has been indorsed. It does not deal with the conditions necessary for a complete bill, or declare that a bill drawn in this form is therefore complete. It is from the time when the instrument is issued in a complete form that the liabilities of the parties accrue: *Ex parte Hayward* (1), and it seems to me that it must also be at the time of issue, that the question of completeness or incompleteness must be determined in accordance with the intention of the parties. The time of issue in this case was not when the drawers signed as drawers, or even when the acceptors signed as acceptors, but the time when Messrs. Nash & Co., having indorsed their name, delivered the indorsed bill to Messrs. McDonald & Co. in exchange for the delivery order. The bill was then a bill of exchange, but incomplete, and it is only under s. 20 that the incompleteness could be cured.

THE LORD CHANCELLOR. My Lords, my noble and learned friend, Lord Buckmaster, desires me to say that he concurs in the general conclusion to which your Lordships have come.

Order of the Court of Appeal reversed and judgment of Rowlatt J. restored. The respondents

(1) (1871) L. R. 6 Ch. 546.

to pay the costs in the Courts below and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

H. L. (E.) 1924 GERALD MCDONALD & Co. v. NASH & Co.

Lords' Journals, March 21, 1924.

Solicitors for the appellants: *Stanley, Hedderwick & Co.*
Solicitor for the respondents: *Newton G. Driver, for Smith, Davies & Jessop, Aberystwyth.*

Distinguished. Re WOHLGEMUTH. [1949] 1 Ch. 12

Distinguished. Re WOHLGEMUTH'S WILL TRUSTS. [1948] 2 All E.R. 882.

[HOUSE OF LORDS.]

WARD AND OTHERS . . . . . APPELLANTS;
AND
VAN DER LOEFF AND OTHERS . . . RESPONDENTS.

H. L. (E.)* 1924 *March* 21

BURNYEAT . . . . . APPELLANT;
AND
VAN DER LOEFF AND OTHERS . . . RESPONDENTS.

Will—Codicil—Construction—Perpetuity—Revocation—Gift to Children of Brothers and Sisters—Testator's Parents living—Legal Possibility of after-born Brothers and Sisters—Inconsistent Gifts in Will and Codicil—Substituted Gift void for Remoteness—Whether Gift in Will takes Effect—Dependent relative Revocation.

Testator devised and bequeathed his residuary real and personal estate to trustees upon trust to pay the income thereof to his wife for life and after her decease in trust for his children as therein mentioned, and if there should be no such child then the testator gave to his wife a power of appointment among the children of his brothers and sisters, and in default of appointment he gave the residuary trust funds to all the children of his brothers and sisters. By a codicil to his will the testator, after declaring that the life interest given to his wife by his will should be terminable on her remarriage unless such remarriage should be with a natural-born British subject, revoked the power of appointment given to his wife and declared that after her death his trustees should stand possessed of his residuary trust funds in trust for all or any of the children or child of his brothers and sisters who should be living at the death of

* *Present:* VISCOUNT HALDANE L.C., VISCOUNT CAVE, LORD DUNEDIN, LORD PHILLIMORE, and LORD BLANESBURGH.

H. L. (E.)
1924
WARD
v.
VAN DER LOEFF.
BURNYEAT
v.
VAN DER LOEFF.

his wife or born at any time afterwards before any one of such children for the time being in existence attained a vested interest and who being a son or sons attained the age of twenty-one years or being a daughter or daughters attained that age or married, if more than one in equal shares. The testator died without issue and left personal estate only. At the date of his will his father and mother, both of whom survived him, were both aged sixty-six years. The father had subsequently died. The testator's widow had remarried with a person who was not a natural-born British subject. All the testator's brothers and sisters were over thirty years of age at the date of the testator's will and all had children, one of whom was born after the remarriage of the testator's widow:—

Held, (1.) on the principle of *Jee* v. *Audley* (1787) 1 Cox, 324, that the gift in the codicil was void for remoteness; (2.) that, the gift in the codicil being inoperative, there was no implied revocation of the gift in the will, and that the latter gift took effect.

Alexander v. *Kirkpatrick* (1874) L. R. 2 H. L. Sc. 397 applied.

Decision of the Court of Appeal affirmed on the first point and reversed on the second [1923] 2 Ch. 52 and decision of P. O. Lawrence J. restored.

APPEALS from a decision of the Court of Appeal. (1)

The facts are fully stated in the report of the case before P. O. Lawrence J. and the Court of Appeal and sufficiently appear from the judgment of the Lord Chancellor, and they are summarized in the headnote.

P. O. Lawrence J. held, first, that the gift in the codicil was void for remoteness, secondly, that, there being no express revocation of the gift in the will, the gift in the will in favour of the testator's nephews and nieces prevailed.

The Court of Appeal held (1.) by a majority (Lord Sterndale M.R. and Warrington L.J.; Atkin L.J. dissenting), affirming the decision of P. O. Lawrence J., that the gift in the codicil was void for remoteness; (2.), reversing the decision of P. O. Lawrence J., that the gift in the codicil operated as an implied revocation of the gift in the will.

The majority of the Court therefore held that the testator died intestate as to his residuary personal estate.

The appellants in the first appeal, the nephews and nieces of the testator living at the remarriage of the testator's widow, claimed to be entitled to the residuary estate either under the codicil or under the will.

The appellant in the second appeal was the infant son of a

(1) [1923] 2 Ch. 52.

brother of the testator and was born after the remarriage of the testator's widow, and he claimed to be entitled under the gift in the codicil.

The respondents were the persons claiming to be entitled on an intestacy.

These appeals were twice argued.

1924. Jan. 22, 24. *Jenkins K.C.* (with him *J. E. Harman*) for the appellants in the first appeal. The class of the children of the testator's brothers and sisters referred to in the will is not left open until any child should attain twenty-one, but would be closed at the death of the widow; or in the events which happened, by the combined operation of the will and codicil, on the remarriage of the widow to a person who was not a natural born British subject; it therefore does not offend the rule against perpetuities. In considering whether the gift in the codicil is void for remoteness, it is conceded that the duty of the Court is first to construe the gift apart from the law of remoteness, and then to see whether the gift transgresses that law; that the question is not whether the limitation is good in the events which have happened, but whether it was good in its creation; and that where the gift is to a class some possible members of which are beyond the limits of remoteness the whole gift is void; but, nevertheless, where a gift is susceptible of two possible constructions the Court will adopt that which will effectuate and not destroy the testator's intention: *Pearks* v. *Moseley* (1); *Jee* v. *Audley*. (2) In construing a testamentary instrument the Court is entitled to have regard to the surrounding circumstances, including the testator's knowledge of the state of his family: *River Wear Commissioners* v. *Adamson* (3); *In re Eve*. (4) In the circumstances of this case the testator, when he speaks of brothers and sisters, whenever the words occur, means the two brothers and the two sisters whom he knew. Having regard to the ages of his parents at the time of the will, brothers and sisters

(1) (1880) 5 App. Cas. 714, 719, 733.
(2) 1 Cox, 324, 326.
(3) (1877) 2 App. Cas. 743, 763–4.
(4) [1909] 1 Ch. 796, 799.

H. L. (E.) 1924 WARD v. VAN DER LOEFF. BURNYEAT v. VAN DER LOEFF.

must mean brothers and sisters in esse. For this purpose brothers and sisters must be treated as personæ designatæ. Suppose the clause in the codicil wholly fails by reason of the rule against perpetuities, the codicil does not expressly revoke the gift in the will in default of appointment, but there is a bequest in the codicil which, if valid, overrides the gift in the will. That being so, the intention of the testator was only to treat the gift in the will as revoked on the footing that the substituted gift operated. The revocation is relative to the new gift, and if the gift fails the revocation fails also. *Venkatanarayana Pillai* v. *Subbammal* (1); *Alexander* v. *Kirkpatrick* (2); *Onions* v. *Tyrer* (3); *Ex parte Earl of Ilchester* (4); *In re Fleetwood* (5); *Duguid* v. *Fraser* (6); *Morley* v. *Rennoldson*. (7) In *Tupper* v. *Tupper* (8) and *Quinn* v. *Butler* (9) there was an express revocation of the gift in the will. In applying the doctrine of dependent relative revocation a distinction has sometimes been drawn between cases where the substituted gift fails by its inherent illegality and where it fails by reason of the incapacity of the recipients to take under it, but the distinction has no logical foundation; it is a question of the intention of the testator in each case.

W. A. Greene K.C. (with him *Lavington*) for the appellant in the second appeal supported the argument on behalf of the previous appellants on the question whether the gift in the codicil was void for remoteness. There is no general rule that a gift to the children of brothers and sisters includes the children of after-born brothers and sisters. Looking at the external circumstances, it is impossible to suppose that the testator in this will and codicil meant anything else than existing brothers and sisters. The case for the appellants is rested on construction and on nothing else, and it is therefore not affected by *Jee* v. *Audley* (10), which has nothing to do

(1) (1915) L. R. 43 Ind. App. 20, 24.
(2) L. R. 2 H. L. Sc. 397, 400–1, 404.
(3) (1716) 1 P. Wms. 343.
(4) (1803) 7 Ves. 348, 376.
(5) (1880) 15 Ch. D. 594.
(6) (1886) 31 Ch. D. 449.
(7) [1895] 1 Ch. 449, 454.
(8) (1855) 1 K. & J. 665.
(9) (1868) L. R. 6 Eq. 225.
(10) 1 Cox, 324.

with construction. [Reference was also made to *In re Pearce* (1); *In re Jeans* (2); *Hill* v. *Crook* (3); *Dorin* v. *Dorin* (4); *In re Dawson* (5).]

Owen Thompson K.C. and *L. F. Potts* (with them *Claude Shebbeare*) for the respondents (called on only on the question of implied revocation). Where you have inconsistent gifts in a will and codicil, and the codicil by reason of some inherent defect is incapable of passing anything, the gift in the codicil does not operate to revoke the gift in the will, for you cannot ascertain the testator's intention from a wholly ineffective instrument. Where, however, the codicil is good as an instrument for the disposal of property, but for some reason the law forbids the gift to take effect, then there is an implied revocation of the earlier gift: *Frenche's Case* (6); *Roper* v. *Radcliffe* (7); *Ex parte Earl of Ilchester* (8); *Tupper* v. *Tupper* (9); *Baker* v. *Story*. (10) In *Onions* v. *Tyrer* (11) there was in substance no inconsistency between the two gifts. In *Alexander* v. *Kirkpatrick* (12), as in *Ex parte Earl of Ilchester* (8), the second instrument was ineffectual to pass anything. [They also referred to *In re Bernard's Settlement*. (13)]

The House took time for consideration.

1924. March 21. VISCOUNT HALDANE L.C. My Lords, in these cases the questions which arise for decision were raised by an originating summons in April, 1922, by John Burnyeat and John Graham, the then trustees of the will and codicil of one William John Dalzell Burnyeat. The will was made on May 13, 1915, and the codicil on April 23, 1916, and the testator died on May 7, 1916. He left surviving him no children, but a father, William Burnyeat, and mother,

(1) [1914] 1 Ch. 254, 260.
(2) (1895) 72 L. T. 835.
(3) (1873) L. R. 6 H. L. 265.
(4) (1875) L. R. 7 H. L. 568, 573.
(5) (1888) 39 Ch. D. 155.
(6) (1586) Roll. Abr. "Devise," O. 4.
(7) (1714) 10 Mod. 230; 5 Bro. P. C. (1803 ed.) 360.
(8) 7 Ves. 348, 372, 374, 378.
(9) 1 K. & J. 665.
(10) (1874) 31 L. T. 631; 23 W. R. 147.
(11) 1 P. Wms. 343.
(12) L. R. 2 H. L. Sc. 397, 400.
(13) [1916] 1 Ch. 552.

H. L. (E.) 1924 WARD v. VAN DER LOEFF. BURNYEAT v. VAN DER LOEFF. Viscount Haldane L.C.

Sarah Frances Burnyeat. The father was born in 1849, and the mother in the same year. The father died in 1921, having by a will and a codicil left such property as he might inherit as next of kin from his son to trustees, who are among the respondents before the House. The testator, William John Dalzell Burnyeat, whose estate consisted exclusively of personalty, left two brothers and two sisters surviving him. These were alive at his death, and were all upwards of thirty years of age. Each of these brothers and sisters had children living at the testator's death. All of these were then infants. There was one other child of a brother, Philip Ponsonby Burnyeat, who was born after the testator's death and after the remarriage of his widow, and he is also an infant. The widow of the testator married a Dutch subject after his death, in 1921, and she is now Hildegard Van der Loeff, a party to these appeals.

By his will the testator William John Dalzell Burnyeat left his residuary estate to trustees for conversion and investment and on trust for his wife for life, and after her decease for his children who, being sons, should attain twenty-one, or being daughters attain that age or marry, in equal shares, with conditional institution of their children in the case of death before vesting. In the event of there being no such child (which happened) he gave his wife power to appoint the trust fund among the children of his brothers and sisters, and in default of such appointment the trust fund was to go in equal shares among all the children of his brothers and sisters.

About the validity of these trusts no question arises. But it is otherwise with the codicil made by the testator. It was in these terms: "I declare that the life interest given to my said wife by my said will shall be terminable on her remarriage unless such remarriage shall be with a natural born British subject. I revoke the power of appointment among the children of my brothers and sisters given to my said wife by my said will. And I declare that after her death my trustees shall stand possessed of the residuary trust funds in trust for all or any the children or child of my brothers and sisters

who shall be living at the death of my wife or born at any time afterwards before any one of such children for the time being in existence attains a vested interest and who being a son or sons attain the age of twenty-one, or being a daughter or daughters attain that age or marry if more than one, in equal shares."

On the construction of the will and codicil, two questions arise. The first is, whether the limitation in favour of children, contained in the concluding words of the codicil, is valid, having regard to the rule against perpetuities. The second is whether, if invalid, this new limitation and the wording of the codicil have been at all events efficacious as expressing a revocation of his bequest to children contained in the will. If the limitation to children in the codicil be invalid, and that in the will has not been revoked, then a further question arises, whether the gift in the will operated in favour of any children of the brothers and sisters who were not born until after the testator's death. Philip Ponsonby Burnyeat, who is one of the parties to these appeals, was a son of the testator's brother, Myles Fleming Burnyeat, but was not born until after the testator's death and the remarriage of his widow. It is argued against his claim that the life interest of the widow was effectively determined by the provision in the codicil and that the class of children to take was finally ascertained at that date as the time of distribution. If this be so, Philip Ponsonby Burnyeat is excluded.

P. O. Lawrence J. was the judge before whom this summons came in the first instance. He decided that the gift in the codicil in favour of the children of the testator's brothers and sisters was so framed as to be void for perpetuity. He held further, that the codicil operated to revoke the residuary gift in the will only so far as the substituted provision in the codicil was valid, and that the gift in the will in favour of these children, therefore, took effect, but merely in favour of such of the children as were born before the remarriage of the testator's widow. Philip Ponsonby Burnyeat was thus excluded. A majority of the Court of Appeal, Lord

H. L. (E.) 1924 WARD v. VAN DER LOEFF. BURNYEAT v. VAN DER LOEFF. Viscount Haldane L.C.

Sterndale M.R. and Warrington L.J., agreed with him in holding that the gift in the codicil in favour of the children of brothers and sisters was void for perpetuity, but held that the codicil revoked the gift in their favour contained in the will, and that there was an intestacy as regarded the residuary estate of the testator as from the remarriage of his widow. Atkin L.J. dissented, holding that the testator must be taken, as matter of construction, to have been referring in his codicil only to the brothers and sisters of the whole blood in existence when he died, just as if he had designated them individually. The provision in the codicil was therefore valid, that in the will having been revoked.

My Lords, the principle to be applied in construing instruments for the purpose of ascertaining whether the direction they contain infringes the rule against perpetuity is a well settled one. It was repeated with emphasis in this House in *Pearks* v. *Moseley* (1), where it was laid down that in construing the words the effect of the rule must in the first instance be left out of sight, and then, having in this way defined the intention expressed, the Court had to test its validity by applying the rule to the meaning thus ascertained. It is only therefore if, as matter of construction, the words in the codicil, taken in the natural sense in which the testator used them, do not violate the rule that they can be regarded as giving a valid direction. Looking at the language of the testator here, I am wholly unable to read it as not postponing the ascertainment of possible members of the class beyond the period of a life in being and twenty-one years afterwards. No doubt if we were warranted in interpreting the testator as having referred only to the children of those of his brother and sisters who were alive at his death we might read his language in a way which would satisfy the law. But for so restricting the natural meaning of his words there is no justification in the language used in the context. He speaks of his brothers and sisters generally, and there is no expression which excludes the children of other possible brothers and sisters of the whole or half blood

(1) 5 App. Cas. 714.

who might in contemplation of law be born. He has nowhere indicated an intention that his words are not to be construed in this, their natural meaning. I think, therefore, that the class to be benefited was not one all the members of which were, as a necessary result of the words used, to be ascertained within the period which the law prescribes, and that the gift in the codicil in favour of children of brothers and sisters is wholly void.

The next question is whether the codicil, although inoperative to this extent, was yet operative to revoke the gift to children of brothers and sisters contained in the will. After consideration, I have come to the conclusion that it was not so operative. There is indeed a revocation expressed in the codicil, but it is confined to the power of appointment given to the wife. It does not extend to what follows. That is, in terms, an attempt at a substantive and independent gift, and, as it is wholly void, I think, differing on this point from the Court of Appeal, that the provision in the will stands undisturbed. There is nothing else in the codicil which purports to affect it. It can make no difference that the class of children is a new and different class if the constitution of the new class is wholly inoperative in law. If it fails, then unless an independent and valid intention to revoke has been independently of it expressed, no revocation can take place. There is no such independent expression of intention here.

The only other point is at what period the class of children of brothers and sisters who took under the will is to be ascertained. I think that according to a well-known rule, the period is that of distribution; in other words, taking the valid alteration in the codicil into account, the remarriage of the widow with a foreign subject. Philip Ponsonby Burnyeat is thus excluded.

The result is that the judgment of P.O. Lawrence J. should be restored. As the difficulty has been entirely caused by the testator himself, I think that the costs here and below should be taxed as between solicitor and client and paid out of the residuary estate.

H. L. (E.) 1924

WARD v. VAN DER LOEFF.

BURNYEAT v. VAN DER LOEFF.

VISCOUNT CAVE. My Lords, these appeals raise two questions relating to the construction and effect of the will and codicil of the late William John Burnyeat—namely, (1.) Was the gift of the testator's residuary estate contained in the codicil in favour of the children of his brothers and sisters therein described void as infringing the rule against perpetuities? and (2.) If so, did the gift in the will of the same residuary estate in favour of the children of his brothers and sisters take effect? It is not disputed that in the latter event the gift was accelerated and took effect on the remarriage of the testator's widow.

In dealing with the first question, it is necessary to bear in mind two principles which have been established beyond dispute. The first is that, in considering whether a testamentary gift is void for remoteness, the proper course is first to construe the gift without regard to the rule against perpetuities, and then, to consider whether the gift as so construed offends against the rule. The second is that in determining whether the rule is infringed possible and not probable or actual events are to be taken into account. Now the trust declared by the codicil is in the following terms: "In trust for all or any the children or child of my brothers and sisters who shall be living at the death of my wife or born at any time afterwards before any one of such children for the time being in existence obtains a vested interest and who being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry if more than one in equal shares." There can be no doubt that, if in this gift the expression "my brothers and sisters" is construed in the ordinary sense as including any brother or sister of the testator who may be born after the testator's death, the gift must, on the principles above stated, be held to be void for remoteness; for such a brother or sister would not be a life in being at the testator's death, and accordingly the class of nephews and nieces to take under the gift might conceivably not be ascertained within the limits of a life in being and twenty-one years afterwards. But it is argued on behalf of the appellants that, having regard to the

circumstances existing at the date of the codicil and known to the testator, the brothers and sisters referred to are not the whole class of brothers and sisters born or to be born but only those born before the date of the codicil. At that date the father and mother of the testator were both over 66 years of age, and of the testator's brothers and sisters then born (of whom there were four) the youngest was aged about 32; and in these circumstances it is urged that the testator must have known that no brother or sister could be born to him in the future, and therefore must have intended to refer to his brothers and sisters already born and to no others.

My Lords, I think this argument inadmissible, and for more reasons than one. In the first place it does not appear to me that evidence of extrinsic facts can be used for the purpose for which the appellants desire to use it. No doubt a Court called upon to construe a will is entitled to know the facts which the testator knew, and to use that knowledge for the purpose of resolving doubts as to the identity of persons or things mentioned in the will or of assigning a meaning to expressions which otherwise would have no "adequate or intelligible sense": per Lord Hatherley in *Dorin* v. *Dorin*. (1) But it is quite another thing to say that, when a testator has used an unambiguous expression such as "my brothers and sisters," extrinsic evidence can be adduced to show that he must have intended the expression to refer to brothers and sisters already born. That would be to use the facts not as evidence of identity but as evidence of intention; and such a use of them would be contrary to settled principles of construction. In *Higgins* v. *Dawson* (2) Lord Davey quotes with approval the reasoning of Rigby L.J. in the Court of Appeal, who said: "The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words . . . . themselves, and evidence sought to be applied to prove intention itself as an independent fact," and added that a

(1) L. R. 7 H. L. 568, 575. (2) [1902] A. C. 1, 10.

H. L. (E.) 1924 WARD v. VAN DER LOEFF. BURNYEAT v. VAN DER LOEFF. Viscount Cave.

will is "only ambiguous when, after full consideration, it is determined judicially that no interpretation can be given to it"—that is to say (as Lord Davey explained)—"without some explanation of the expressions used in it which are descriptive of the subjects of the bequests or of the persons to whom the bequests are made." It has been urged in this case that the evidence is referred to not for the purpose of showing intention but for the purpose of identifying the persons intended. I find myself unable to accept that contention. The phrase describes a class general in its extent and clear in its description, and the evidence sought to be admitted is to show that the gift was intended to be limited to four persons and was not, in truth, a class gift at all. This is to show that the testator intended something different from the ordinary meaning of the words which he used.

But even if some extrinsic evidence were admissible for the purpose desired, I think it clear that according to the established rules of our Courts the particular evidence relied upon—namely, the fact that the testator's mother was past the age of child-bearing, is inadmissible for that purpose. The rule was laid down at least as long ago as in *Jee* v. *Audley* (1), where Lord Kenyon said: "I am desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case it may in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture." This ruling has been followed ever since; and, if I may borrow an expression used by Lord Kenyon in the same case, I should say that the ruling has grown reverend by age and is not now to be broken in upon. The rule was treated as settled by this House in *Lord Dungannon* v. *Smith* (2), where Lord Brougham, using somewhat extravagant language, described the judgment in *Jee* v. *Audley* as "one of the corner-stones of the law"; and was

(1) 1 Cox, 324, 325. (2) (1846) 12 Cl. & F. 546, 631.

again applied in *In re Dawson* (1), where Chitty J. in a careful judgment explained the rule and reinforced it by a reference to Co. Litt. (vol. i., s. 53), where Coke said that in considering the right to dower the possibility of issue would be assumed "albeit the wife be a hundred years old." The case last cited completely covers the present case, and it would not be possible to decide this point in favour of the appellants without overruling the judgment of Chitty J. I think that it is far too late either to question the principle or to endeavour to whittle it away; and it is fatal to the appellants' argument.

In coming to this conclusion I have set aside the consideration that the testator's father might possibly have survived his wife and married again and might have had issue by such remarriage. As at present advised I am disposed to think that such a child, being a brother or sister of the half-blood, would come within the expression "my brothers and sisters" in the testator's will, and accordingly that the children of any such child would take under the terms of the codicil. But this point was not much argued, and I prefer to rest my decision upon the wider ground already stated.

I conclude, therefore, that the gift in the codicil is void; and it remains to consider whether the gift in the will fails also. In my opinion it does not. The codicil, while it expressly revokes the power of appointment given to the testator's wife by the will, contains no words of revocation affecting the gift in default of appointment. No doubt, if the gift in the codicil had taken effect, it would have superseded and to that extent would have impliedly revoked the gift in the will; but the implication of revocation is found only in the terms of the substituted trust, and if that trust falls to the ground the implied revocation falls with it. The substituted gift, like the original, is in favour of nephews and nieces of the testator, although the particular class of nephews and nieces who are to take is modified; and I cannot on the words of this codicil attribute to the testator

(1) 39 Ch. D. 155, 163, 164.

H. L. (E.) 1924 WARD v. VAN DER LOEFF. BURNYEAT v. VAN DER LOEFF. Viscount Cave.

an intention of wholly revoking the trust in the will even though the modification intended by the codicil should fail to take effect. The authority for this view is not to be found in *Onions* v. *Tyrer* (1) and cases of that class where even express words of revocation failed to take effect, but rather in cases like *Alexander* v. *Kirkpatrick* (2); *Duguid* v. *Fraser* (3); and *Morley* v. *Rennoldson* (4), where there were no words of revocation; and the principle could hardly be more clearly stated than in the words of Lord Hatherley in *Alexander* v. *Kirkpatrick* (2), where he said: "The Court feels itself in this position, according to the case cited by Mr. Pearson, that it can discover an intention to revoke only in the altered disposition which is attempted to be made by the second instrument; and if that disposition fails, then also the Court must fail to perceive an indication of an intention to revoke the first, the Court not being able to find that there is in truth any inconsistent disposition at all in consequence of that which was intended to be such having wholly failed to take effect."

For the above reasons I am of opinion that the judgment of the Court of Appeal should be set aside (except as to costs) and the judgment of P. O. Lawrence J. restored. In the special circumstances of the case I agree that the costs of all parties to these appeals as between solicitor and client should be ordered to be paid out of the testator's estate.

LORD DUNEDIN. My Lords, the main question in this case seems to me to be determined by what was said in this House by Lord Cairns in the two cases of *Hill* v. *Crook* (5) and *Dorin* v. *Dorin*. (6) In the former of these cases that noble and learned Lord laid down that when you wish to vary the meaning of a word denoting a class of relations from what the prima facie meaning of that word is—he actually said it of the words legitimate children, but the application is obviously wider—there are two classes of

(1) 1 P. Wms. 343.
(2) L. R. 2 H. L. Sc. 397, 404.
(3) 31 Ch. D. 449.
(4) [1895] 1 Ch. 449.
(5) L. R. 6 H. L. 265.
(6) L. R. 7 H. L. 568.

cases only where the primary signification can be departed from. The one is where it is impossible in the circumstances that any person indicated by the prima facie meaning can take under the bequest. That is not the case here because probably in law, though scarcely in fact, the idea of other brothers and sisters to the testator coming into existence could not be excluded, but in any case the half-brother or sister was a real possibility. The second class of cases is where you find something in the will itself, that is, in the expressions used in the will, to exclude the prima facie interpretation. That also seems to me absent. He has used the words "brother and sister" without explanation or glossary, and I am afraid he must take the consequences. On the first point, therefore, I agree with your Lordships.

The second question is whether there was a revocation of the settlement of the residue by the will in respect of the execution of the codicil. My Lords, I confess I do not understand what the learned Master of the Rolls meant when he said that no case had been cited to him where, there being a gift in the codicil inconsistent with that in the will and that inconsistent gift having failed, it had been held that the gift in the will still existed. In the face of *Alexander* v. *Kirkpatrick* (1), not to mention many others, it is impossible, I think, to justify this observation. Warrington L.J. goes on to say that the result is in accordance with justice, because he says if the testator had known that his codicil would not receive effect who can tell but that he would have made a different modification equally destructive of the arrangements in the will? With great deference this seems to me to beg the question, for it assumes that the first action of the testator was to revoke what had been done in the will. The mere fact of writing a codicil does not revoke the prior will. The codicil may contain words of revocation and, if so, they will receive effect. But if there are no such words the revocation can only be found if it is necessarily implied, and it will be implied, if what is done brings into being a position inconsistent with what was arranged under the will. If,

(1) L. R. 2 H. L. Sc. 397.

H. L. (E.) 1924 WARD v. VAN DER LOEFF. BURNYEAT v. VAN DER LOEFF. Lord Dunedin.

therefore, nothing is done which creates such a position then there is no implied revocation and ex hypothesi there is no direct revocation. It was, however, urged on behalf of the respondent that *Kirkpatrick's Case* depended on the fact that the inefficiency of the new settlement was due to the non-efficiency of the words of conveyance, and that a different result would follow where the inefficiency depends on some inability on the part of the taker or some incompetence in the interest created. I do not think this is a sound distinction. It would be curious if it were so. The question obviously depends on the intention of the testator as gathered from the words he has used, and it is difficult to understand how that intention can be varied accordingly as the inefficiency of the new arrangement depends on whether he has not legally carried out his intention by the words he has used or whether the law has made impossible the thing he was trying to do. But as a matter of fact there were many cases quoted before their Lordships who decided *Kirkpatrick*, which give instances of the inefficiency being of the latter sort. By the law of Scotland a disposition of heritable property, if made to the prejudice of the heir within forty days of death and if the disponer had not been to kirk or market, could be set aside by the heir. But if there was an anterior disposition made before forty days from death equally to the prejudice of the heir, though made in favour of other persons than the person favoured by the death-bed disposition, then it was held that the heir's title failed, for it was useless for him to get rid of one disposition merely to set up another equally prejudicial to him. It therefore became of great moment for the heir to find, if he could, a revocation of the anterior disposition in the death-bed disposition. It was first found in a case which reached the House of Lords that where there was an express revocation in the death-bed deed that was quite good, although the disposition in the death-bed deed could not receive effect if challenged by the heir. But when it was afterwards sought to extend this doctrine to a revocation to be implied only from the inconsistency of the two dispositions it was held

that this attempt could not be sanctioned. The case of *Roxburghe* v. *Wauchope* (1) came also to the House of Lords, and Lord Eldon's judgment is so much to the point and is expressed with a brevity not always to be found in that very learned Lord Chancellor's pronouncements that I venture to quote it at length : " As to the question of implied revocation, if we are to act on the maxim of stare decisis, the judgment cannot be disturbed. The deed in *liege poustie* reserves a power of revocation. By making another disposition under the authority of the power, it must be supposed that the disponer intended to do something effectual, and it cannot be implied that by the exercise of the power he meant to revoke it."

Now it is true that the law of death-bed is peculiar to the law of Scotland, but the principle underlying its application to this question is not peculiarly Scotch. It should be observed that the death-bed disposition was not, as in *Kirkpatrick's Case*, ineffectual to convey ; it was a perfectly good deed but liable to be reduced by the heir at law.

While I do not think that the law has ever varied in Scotland there were conflicting decisions in England. There is a very short note of such a point in the old case of *Roper* v. *Radcliffe*. (2) There a codicil had been executed which was subject to an attack under the Disabling Law applicable to Papists. The decision of the Court was that the codicil was good, but they gave their opinion that in any view the codicil would act as a revocation in respect of the inconsistency of the gift. Appeal was taken to the House of Lords and the latter point was not appealed. On this appeal the judgment was reversed on the merits, and then the first point stood without a decision of the Lords upon it. Sir G. Jessel decided in the same way in the case of *Baker* v. *Story*. (3) But the authority the other way is more cogent. In 1803 (*Ex parte Earl of Ilchester* (4)) it was held that a testamentary appointment of a guardian was not revoked by a subsequent testamentary appointment inconsistent with

(1) (1820) 1 Ross. L. C. 659, 665.
(2) 10 Mod. 230.
(3) 31 L. T. 631.
(4) 7 Ves. 348.

H. L. (E.) 1924

WARD v. VAN DER LOEFF.

BURNYEAT v. VAN DER LOEFF.

Lord Dunedin.

it, but not executed according to the statute. The case of *Onions* v. *Tyrer* (1) went further (further, I think, than is justified), for there in the second devise, which was void for want of subscription of witnesses in the presence of the testator, there was an expressed revocation and yet it was held not to operate as such. But the case of *Alexander* (2), though a Scotch case, dealt with the whole subject, and it is worth while to see how the noble Lords expressed themselves. Lord Cairns used the words "valid or effectual." It is clear that "valid" covers the case then in point, but "effectual" goes beyond it and touches all cases where practical inefficiency is the result. Lord Chelmsford puts the matter very clearly: "Where a subsequent deed, assuming the power exists to revoke or alter the former one, contains dispositions wholly different from the prior one without express words of revocation, as the two dispositions cannot stand together, the latter deed must prevail. This on the ground, not of revocation, but of inconsistent provisions. Viewed in this light, the question appears to me to be very clear. The parties meant to vary and depart from the dispositions in the former deed by substituting other and different ones, but they failed to execute their intention in the only way in which it could be really and effectually done. Then the proposed substituted provisions never taking effect, nothing exists to interfere with the former deed."

Lord Hatherley, though he explains the matter as belonging to the law of Scotland, goes on to say: "The Court feels itself in this position, according to the case cited by Mr. Pearson, that it can discover an intention to revoke only in the altered disposition which is attempted to be made by the second instrument; and if that disposition fails, then also the Court must fail to perceive an indication of an intention to revoke the first, the Court not being able to find that there is in truth any inconsistent disposition at all in consequence of that which was intended to be such having wholly failed to take effect."

(1) 1 P. Wms. 343. (2) L. R. 2 H. L. Sc. 397, 403, 404.

Now the cases cited by Mr. Pearson were *Onions* v. *Tyrer* (1) and *Ex parte Earl of Ilchester* (2); and that this is to be taken as a general rule, not confined to the class of cases where the failure is due to inefficacy of words of conveyance but extending to those where there is inability in the disponee to take, is shown by a recent case in the Privy Council: *Venkatanarayana Pillai* v. *Subbammal* (3), where Lord Wrenbury again uses the words "valid or effectual."

My Lords, I may summarize what I consider to be the law thus: If when a subject has been disposed of in a will and the same subject is again disposed of, either in a subsequent will or in a codicil, then if you can find, apart from the description of the subject, words expressly or impliedly effecting revocation, that revocation will stand, whatever the fate of the subsequent disposition; but if the only revocation is that which is to be gathered from the inconsistency of the subsequent disposition with the earlier one, then if the second disposition fails from any reason to be efficacious there will be no revocation.

I therefore think the judgment of P. O. Lawrence J. was right and should be restored.

LORD PHILLIMORE. My Lords, upon the first question which is common to both sets of appellants, I am in agreement with your Lordships in affirming the conclusion arrived at by P. O. Lawrence J. and the majority of the Court of Appeal. I have read over again the dissentient judgment of Atkin L.J., and I am not convinced by it.

Three points are, I think, taken upon behalf of the appellants. First, they say that when the testator spoke of the children of his brothers and sisters, he must be taken to have meant, and meant only, the children of the two brothers and of the two sisters who were then in being, and whom he knew. I find no warrant for so limiting the words, which are general in their nature. Secondly, it is

(1) 1 P. Wms. 343. (2) 7 Ves. 348.
(3) L. R. 43 Ind. App. 20.

H. L. (E.) 1924 WARD v. VAN DER LOEFF. BURNYEAT v. VAN DER LOEFF. Lord Phillimore.

said, that having regard to the age of his parents, both of whom were living, he could not be taken to expect, and indeed there could not be any further brothers or sisters. I doubt whether this is an admissible consideration. I am inclined to think that in dealing with the limitations of property by an instrument, the law considers persons in the abstract and not the concrete flesh and blood. However that may be, there was in this case no physical impossibility in there being further brothers and sisters of the half-blood, and the words of the testator according to the accepted rules of construction are wide enough to include such brothers and sisters. Thirdly, stress was laid upon provisions in the codicil restricting the children of brothers and sisters who were to take to such as should be born before any of those in existence attained 21 or married. And it was said that to introduce any such child even of the half-blood it would be necessary to have a holocaust of the seven now living children. As to this, the best that can be said is that which was said by Atkin L.J.: "That seems to me to be a matter which no business person could possibly have contemplated in view of these circumstances."

My Lords, in applying the rule against perpetuities to the limitations in any instrument of conveyance, it is well established that if in any possible event the period during which property would be tied up exceeds the period allowed by law the disposition becomes invalid. The rule against perpetuities is, as I apprehend, judge-made law; and the Courts have adopted a somewhat peculiar attitude in this matter. They have treated attempts to tie up property as actions only excusable in so far as they do not transgress the legal limits, and any transgression as something to which a penalty is to be applied. Inasmuch, therefore, as it would be possible, even if highly improbable, that the property might be under the dispositions of the codicil tied up for an undue length of time, these dispositions become wholly invalid.

So far, my Lords, as to the point common to the two appeals, I now approach the point in which the decision of

Lawrence J. was favourable to the seven appellants on the first appeal but was reversed by the unanimous judgment of the Court of Appeal. This point is an interesting one and of some delicacy and difficulty. These appellants say that though the dispositions in the codicil would, if they could stand, supersede the provisions in the will, yet inasmuch as they cannot stand, the provisions in the will are not superseded, and these appellants can take the benefit of them.

My Lords, that there is a doctrine of dependent relative revocation is not to be doubted. I say, my Lords, it is not to be doubted, but after reading again the judgment of the Court of Appeal, it appears to be a doctrine to which their Lordships have only rendered lip service. On this question a number of cases have been cited to your Lordships. I will begin with that of *Onions* v. *Tyrer* (1), because it is a simple case. At that time, according to the law regulating devises of land by will, a nicety was required in the attestation of a will devising land which was not required for a will merely revoking a devise. In consequence, where a testator had made a good first will devising land and a second will in terms revoking that devise and substituting another, differing, it is true, rather in machinery than in substance, and this second will was sufficiently executed for revoking purposes but not sufficiently for devising purposes, the Court held that the revocation was conditional only, and made in order to let in the new arrangement, and that, as the new arrangement could not stand, the revocation might be considered as conditional only and disregarded, and so the first will could stand. The decision in *Alexander* v. *Kirkpatrick* (2) turning upon a point of Scotch conveyancing, maintains the same principle. *Ex parte Earl of Ilchester* (3) seems to be to the same effect.

The case of *Roper* v. *Radcliffe* (4) has been supposed to lay down some limitation of this doctrine. It is suggested that the case shows that dependent relative revocation only

(1) 1 P. Wms. 343.
(2) L. R. 2 H. L. Sc. 397.
(3) 7 Ves. 348.
(4) 9 Mod. 167, 181; 10 Mod. 230.

H. L. (E.) 1924 WARD v. VAN DER LOEFF. BURNYEAT v. VAN DER LOEFF. Lord Phillimore.

applies where the second instrument fails from defect of form and not where it fails from defect in the capacity of the person who is to be benefited by the second instrument. I shall have, my Lords, in a moment, to discuss this supposed principle; but I will first devote some consideration to this case of *Roper* v. *Radcliffe*. (1) I have pursued the case through such reports as are available. I have also looked into the Lords' Journals.

By an Act then in force (11 & 12 Will. 3, c. 4) Papists were disabled, generally speaking, from taking land by will. The testator, one Roper, having conveyed his lands to the uses of his will, by his will devised them to four persons whom he named as his executors upon trust to sell and to hold the proceeds for themselves and their heirs. Two of these executors were Roman Catholics; and two were, according to the phraseology of the day, Protestants. By codicil he altered the devise and devised the lands to the Roman Catholic executors only. They filed a bill claiming the property, to which the heir at law and the two Protestant executors were made defendants. All the defendants set up the statute, the heir claiming as upon an intestacy, and the two Protestant executors treating the codicil as ineffective and claiming under the will, contending that the devise to the four must be deemed to be a devise to the two, the disabled executors being treated as if they were non-existent. In addition to making this case in their answer they set it up also in a cross bill.

The Lord Chancellor, who was specially assisted by several judges, decided in favour of the Roman Catholic executors, principally on the ground that the land was to be sold, and the proceeds of land were not like land and could well be bequeathed, as personal estate could be bequeathed, to Roman Catholics. Naturally, if this view was correct, the codicil was good, and there was no question of dependent relative revocation, and therefore the case of the Protestant executors failed. It was no doubt observed that in any case it would not have succeeded, as the codicil had absolutely

(1) 9 Mod. 167, 181; 10 Mod. 230.

revoked the devise contained in the will. But this observation must have been an obiter dictum.

An appeal was taken on behalf of the heir to the House of Lords, and after the judges had given their opinions—six in favour of the heir and five against him—the judgment of the Lord Chancellor is reported to have been reversed by a large majority. It is interesting to notice that, according to the Lords' Journals, the sitting of the day was wholly given to judicial business, and the presence of a large number of Lords, spiritual and temporal, is recorded.

The report in Modern Reports says that at the Bar of the House, counsel for the heir and counsel for the Roman Catholic executors agreed that no good case could be made on behalf of the two Protestant executors who took under the will, as the codicil had revoked the devise in the will; but these executors were not parties to the appeal and brought no separate appeal of their own; and the decision against them rests upon the decree of the Lord Chancellor.

The statement of the terms of the will and the codicil is so meagre that it seems to me difficult to draw any certain inference from this case. There may well have been words showing an absolute and unconditional intention to revoke the original devise. Moreover, the devise in both instruments was almost certainly a devise to trustees and not to beneficiaries, and there must have been some secret trust, probably for some purpose which in the then state of the law was forbidden to Roman Catholics; and this being so, if the decision in favour of the two Roman Catholic executors could not stand, it was not likely that the alternative devise would be allowed to take effect.

My Lords, I have dealt with this case at some length, because it seems to me on the whole that which weighs most heavily against the seven appellants.

In the cases of *Tupper* v. *Tupper* (1) and *Quinn* v. *Butler* (2) the codicil contained express words revoking the bequest of the will; and in each case the Court came to the conclusion upon the construction of the whole document that whether

(1) 1 K. & J. 665. (2) L. R. 6 Eq. 225.

H. L. (E.) 1924 WARD v. VAN DER LOEFF. BURNYEAT v. VAN DER LOEFF. Lord Phillimore.

the codicil could stand or not, the testator intended to annul the previous disposition which he had made in his will. This is a view which, as I apprehend, it is always open to a Court of construction to take. I cannot, however, assent to the second rule stated by Mr. Jarman in his work on Wills. He states his rule in the following words: "If the second devise fails, not from the infirmity of the instrument, but from the incapacity of the devisee, the prior devise is revoked" (ed. 1910, pp. 169, 170). Great as is the authority of the writer, I would rather subscribe to the criticism of Mr. Theobald in his work on Wills. He says: "This is a mere distinction of fact, and not of principle. It may even be doubted whether it reconciles the cases in fact" (p. 746).

In truth, my Lords, the cases where, to use the euphemistic language of Lord Romilly M.R., "there has been a defective execution of the second instrument," are a fortiori cases. An instrument defectively executed is no instrument. It is but a written memorandum of intentions not carried into effect; and even if it be an instrument valid for some purposes of destruction, as in *Onions* v. *Tyrer* (1), or *Alexander* v. *Kirkpatrick* (2), the constructive part takes no higher position than that of a memorandum. In such cases the Court has made a wide stride in order to effectuate what it believed to be the intention of the testator, when it has inferred from an invalid document that a valid revocation was intended merely to express a preference and was not meant for an absolute supersession. Possibly the extreme was reached when in certain cases in the Court of Probate a will destroyed animo revocandi has nevertheless been admitted by a copy to probate, on oral evidence that it was only destroyed by the testator in order to make room for a later will which somehow or other he never found time to make: see *Dixon* v. *Treasury Solicitor* (3) and cases there cited.

It is a much less stretch for the Court of construction to take two valid instruments and piece them together, and on finding that there is an invalid bequest in the second

(1) 1 P. Wms. 343. (2) L. R. 2 H. L. Sc. 397.
(3) [1905] P. 42.

instrument, look at all the terms of both documents and determine whether the revocation, explicit or implied, in the second instrument, was intended to take away the bequest in any event from the legatee under the will or merely to give effect to a preference of the legatee under the codicil over the legatee under the will. When, as in *Onions* v. *Tyrer* (1), or not quite so closely in the present case, the substituted bequest is the benefiting of the same individuals by another machinery, this may be a strong reason for the conclusion that the revocation was dependent and conditional.

I am at one with your Lordships in holding that this appeal should be allowed.

LORD BLANESBURGH. My Lords, I too have arrived at the same conclusions as the rest of your Lordships. I am of opinion that the ultimate gift of residue contained in this testator's codicil is void as transgressing the rule against perpetuities, and I think it is also inoperative to revoke those residuary dispositions of his will which rank subsequent to the interest thereby given to his widow.

We have in this case, my Lords, an extreme but by no means uncommon illustration of the stringency—I might even describe it as the penal character—of this rule. At no time was there here any practical possibility that a perpetuity could eventuate as a result of the complete fulfilment of the terms of the gift in question ; while, by the time any contest as to the validity of the gift arose, it had become, by reason of the death of the testator's father, inconceivable that any infraction of the rule could be involved in it. If we consider matters as they stood at the testator's death, which is, of course, the really relevant date, it was necessary before anything obnoxious to the rule could take place in connection with this residuary gift, that the following remarkable conjunction of events should supervene. The testator's father and mother were then each upwards of sixty-six years of age ; to them, after a family of five, no child had been born for more than thirty years. It was, nevertheless, necessary that they

(1) 1 P. Wms. 343.

H. L. (E.) 1924

WARD v. VAN DER LOEFF.

BURNYEAT v. VAN DER LOEFF.

Lord Blanesburgh.

should have another child. Alternatively it was necessary that their marriage should be dissolved otherwise than by the death of the father, and that he should marry again, and have a child by that second marriage. That child, in turn, had to have a child born after the death of the testator's widow—one born in her lifetime would not have been excluded by the rule. And even a child so born would have brought about an infraction of the rule, only if it had also eventuated that no one of the already substantial and apparently increasing families of the testator's four living brothers and sisters had survived his widow having married or attained twenty-one.

So much, as matters stood at the testator's death, had to happen before any nephew or niece excluded by the rule could appear. By the date of the summons on which the orders under appeal were made, this new event had to take place before the rule could be infringed. The testator's mother had survived her husband; she, then a widow lady of upwards of seventy-two years of age, had to marry again and have issue.

It is, I think, only fair to the draftsman of this codicil, manifestly prepared under severe pressure of time, to give this indication of the apparent remoteness of any provision contained in it from the danger of a perpetuity. It is quite certain, I make bold to say, that no idea of such a possibility entered anybody's mind. In its application to the present case, the rule has been really a snare, useless so far as its legitimate purpose is concerned, but operative in the view of the Court of Appeal and operative also in the view of this House (but for a fortunate accident for which the rule is entitled to no credit), to produce an intestacy under which certainly one person would greatly benefit whose interests it was the permissible and express purpose of the testator by his codicil to circumscribe and reduce.

In my own experience nearly all modern manifestations of the rule are of this character, and have this result. The rule has so schooled testators into compliance with, perhaps even into approval of, its requirements, that deliberate

attempts to push their privileges beyond its strict limits are now rarely made. So far as the Courts are concerned, the existence of the rule in these days is usually made manifest only in cases where nothing of the kind having been desired or suspected, and where by nothing short of a miracle could a perpetuity at any time have supervened, even that possibility has, by the time of the contest, ceased to be existent. All the same in these cases the rule is fatal even to gifts so innocuous, and I cannot doubt that such a result is both mischievous and unfortunate, in many directions—in this notably, that it brings a sound principle into entirely gratuitous discredit. Nevertheless I most fully agree that the rule is not to be whittled away by the Courts even for such a reason as that. It is too well authenticated in all its recognized incidents to be any longer under the control of any Court. It is the Legislature alone, which, maintaining the salutary purpose of the rule in its proper application, can, if it pleases, remove from it those incidents or excrescences which, without assisting to achieve its legitimate object, have done much mischief in other directions.

In the present case, and notwithstanding the actual conditions to which I have referred, I am, like the rest of your Lordships, satisfied that on the construction of the words here used by the testator, it is impossible to say that this gift is not within the prohibition of the rule as we have inherited it. It is agreed that the only conceivable means of escape is, either by construction or otherwise, to confine the apparently general expression "my brothers and sisters" to the brothers and sisters of the testator in being at the date of his codicil. On construction it is not, I think, open to your Lordships so to limit these words. Nor is it, in my judgment, permissible, by reference to surrounding circumstances, to confine them, as Atkin L.J. thought he could, to those same brothers and sisters as being the only brothers and sisters the testator knew, and as being in consequence and in the circumstances those with reference to whom alone he must be taken to have spoken.

My Lords, I think that such evidence is for such a purpose

H. L. (E.) 1924 WARD v. VAN DER LOEFF. BURNYEAT v. VAN DER LOEFF. Lord Blanesburgh.

quite inadmissible. The evidence here sought to be relied on was in *Jee* v. *Audley* (1) rejected as proof of the impossibility of further births. It would be strange if it were admissible for the purpose of showing that the testator referred in his will only to his existing brothers and sisters, because it demonstrated that he knew perfectly well he never could have any others. Indeed, with reference to *Jee* v. *Audley* (1), I find Rolfe B., when advising this House in *Lord Dungannon* v. *Smith* (2), saying that it was there quite clear that the testator never had in his contemplation any daughters other than those already born. Yet that circumstance was not allowed to affect the ordinary meaning of the words. To my mind that case is a complete answer on this point. If further authority for the rejection of the proposed evidence is required it will be found in *In re Sayer's Trusts.* (3) I need not say anything upon the question whether the evidence if admitted would be effective for its purpose. But I greatly doubt it. On the whole matter I agree with your Lordships upon the first question.

Upon the second question whether the codicil, although inoperative to dispose of the testator's residue, was effective to revoke the gifts in the will to his own children and to the children of his brothers and sisters, I have also arrived, as I have said, at the conclusion that it was ineffective for either purpose.

But, upon this matter, I prefer to rest my judgment exclusively upon the ground chosen by the learned judge, as the basis of his. In view of the express revocation in the codicil of the power of appointment given to his wife by the will—a revocation confined to that power—I find myself, like Lawrence J., able from the language of the testator employed in both documents to conclude that his intention was that the gifts of his residue contained in the will should not altogether be displaced by the codicil, but that they should be displaced only in favour of the class of nephews and nieces therein described.

(1) 1 Cox, 324. (2) 12 Cl. & F. 546, 576.
(3) (1868) L. R. 6 Eq. 319.

But, had these words of express revocation, applicable only to another provision of the will, been wanting, I should, myself, have had difficulty in reaching this conclusion. The question being whether, on the construction of the two documents, the gift in the codicil indicates a supersession of, or only a preference over, the gifts made by the will, I am struck by the entire inconsistency of the two gifts. The similarity between this clause of the codicil and the corresponding provisions of the will is superficial and apparent rather than real. The codicil in relation to nephews and nieces not only defines a class which in its membership may in the event be entirely exclusive of the class of nephews and nieces as described in the will, but it also completely shuts out from benefit the testator's possible children whose interests under the will preceded any thereby conferred upon any nephews and nieces. Apart from outside circumstances, to the possibility of which I am fully alive, but to the existence of which I apprehend I am not entitled to have regard, even if I knew them (see *Venkatanarayana* (1)), I should find it difficult to conjecture how the testator's intentions with regard to his own children, once displaced by a gift in favour of a postponed class, could properly be said to be subsequently dependent upon the question whether that gift was in the result effective or not.

And there is another consideration operative in the same direction. Under the will, apart from the codicil, Mr. Greene's client, as the son of one of the testator's brothers born in the lifetime of his widow, would clearly be included. Under the codicil he is equally clearly included, with no personal bar to his own participation. In either contingency, therefore, whether the widow took an interest for life or one more limited, this respondent is included by the testator amongst those in benefit. But if the residuary clause in the will is now restored, it has to be restored to a class that excludes this respondent. Could such an intention be imputed to the testator if there were no words to assist that result? I have difficulty in seeing how it could. His

(1) L. R. 43 Ind. App. 20.

H. L. (E.) 1924

WARD v. VAN DER LOEFF.

BURNYEAT v. VAN DER LOEFF.

Lord Blanesburgh.

intention to the contrary has been expressed both in the will apart from the codicil, and in the codicil apart from the will.

And exclusion from a class of any person comprised in it affects the whole gift. Rolfe B., if I may again quote from his advice to this House in *Lord Dungannon* v. *Smith* (1), refers to this subject. "The reason," he says, "why a gift to a class, as children or the like, is void when it may embrace some objects too remote, is this:—there is no intention to give to any number short of the whole class; and, therefore, if the prescribed limit *may* be transgressed before the class is filled up, the whole gift fails."

Has then the testator here ever manifested an intention to give anything to any class of nephews from which Mr. Greene's respondent is excluded? The answer, I think, must be that he has not. For this reason also I should, apart from the express but limited words of revocation, have had difficulty in reaching any conclusion on this point other than that adopted by the Court of Appeal.

Nor would the English authorities, as I read them, have assisted another conclusion. These authorities are none too clear. Perhaps they are not all quite consistent. But while they fail, I think, to establish, as was contended by Mr. Potts, that the doctrine of dependent relative revocation is confined to cases where the second bequest fails from the infirmity of the instrument by which it is made, and does not extend to cases where it fails from the incapacity of the legatee to take, they do, I think, show that there has hitherto in England been held to be a marked distinction between the two classes of cases, and the instances are few in which in the latter class the implied revocation has not been held to be effectual for all purposes. The recent decision of *Venkatanarayana* (2) in the Privy Council is one of these; the view of Hall V.-C. in *In re Fleetwood* (3) may, but perhaps doubtfully, be claimed as another. Of course, in the extreme case where revocation is sought to be established

(1) 12 Cl. & F. 575. (2) L. R. 43 Ind. App. 20.
(3) 15 Ch. D. 594.

by an ineffective testamentary instrument there is little difficulty. The intention to revoke may there be as clear as it can be, but it is contained in an instrument at which for the purposes of indicating testamentary intention the Court may not even look. An instrument not operative as a will is, for that purpose, no better than an unattested or even an unsigned memorandum. The case is, however, more difficult where, as happened before the Wills Act, the will in question might be good as a revocation but be quite invalid for any dispositive purpose. *Onions* v. *Tyrer* (1) is the leading case on this subject. But there, it is, I think, at least doubtful whether the Lord Chancellor regarded the revocation as effectual for any purpose, and he was certainly greatly influenced in his conclusion that it was not by the fact that the second instrument did not even purport to alter the beneficial dispositions of the first. It may be, however, that the true explanation of this case is to be found in the judgment of Lord Hatherley when Vice-Chancellor in *Tupper* v. *Tupper* (2), where he says that the testator in such a case intends the instrument to operate in an entire and not in a mutilated form: so that either the whole of it must be looked at or no part of it.

Tupper v. *Tupper* (2) is also important for the fact that the Vice-Chancellor clearly recognized the distinction in this matter between the two classes of case, and expressly approved of its application in *Frenche's Case*, to which he refers in his judgment. A most learned disquisition on the whole subject and to the same effect will be found in the note to *Onions* v. *Tyrer* (3), in which a number of cases, beginning with *Roper* v. *Ratcliffe* (4), are referred to in support of the proposition that a devise of lands void in respect of the incapacity of the devisee to take shall revoke a former devise. This same view has in more recent times been taken by Sir George Jessel in the case to which your Lordships' attention has already been drawn.

(1) 1 P. Wms. 342.
(2) 1 K. & J. 665.
(3) 1 P. Wms. 343*n*.
(4) 1 Bro. P. C. 450 (Folio ed.); 5 Bro. P. C. 360 (1803 ed.).

H. L. (E.) 1924 WARD v. VAN DER LOEFF. BURNYEAT v. VAN DER LOEFF. Lord Blanesburgh.

Nor so far as the English authorities go is this question of relative revocation held necessarily to be concluded either by the presence or absence of express words of revocation. I find nothing in any of the cases cited which precludes me from accepting as correct this passage from the judgment of Neville J. in *In re Bernard's Settlement.* (1)

"It does not seem to me," he says, "that the real point is determined by the question of whether there are words of direct revocation or whether such words are absent. I think it is far too narrow a view to apply any such rule in construing documents of this kind, because it seems to me that when you have a gift in lieu of a previous appointment, either by necessary implication or by direct words, you must revoke the original appointment if you are to give effect to the second; and therefore, whether a testator says in so many words 'I do revoke' or whether he uses words which necessarily involve revocation, it seems to me the result is the same, and that it would not be a wise distinction to make, except so far as the use of the direct words may be some guide as to the intention of the testator."

In connection with the last observations of the learned judge, it must, I think, be agreed that the presence of express words of revocation may frequently be decisive. It is more difficult to say that their absence necessarily or even naturally connotes that only a relative revocation is intended. For the fact that a later gift of the same thing to another beneficiary is intended to supersede the earlier gift in any event may frequently be apparent from the very change in its destination. Suppose, for example, a testator, being at the date of his will an Anglican, gives the residue of his estate to the Church Association, and, having during the interval entered the Roman Church, he by a codicil in which there are no express words of revocation, gives the same residue to a Roman Catholic society. Suppose, again, another testator by his will gives his residue to the Lord's Day Observance Association, and by a codicil some years later gives the same residue to the Sunday Concert

(1) [1916] 1 Ch. 552, 560.

Society, and suppose further that in each case the second gift fails, either because the society had ceased to exist before the gift became effective, or for some other reason, can it be doubted that each testator had lost all interest in the objects of his first beneficiary, and that his intention to supersede entirely the gift in favour of the Association would hardly be made clearer by the addition of express words of revocation? And many similar cases can easily be suggested.

Nor do I think that this view is affected by the statement of Cairns L.C. in *Alexander* v. *Kirkpatrick* (1), where he says: "It appears to me that no case has been produced, and that no case can be produced, where either in England or in Scotland a mere alternative inconsistent disposition, which is not valid or effectual in itself, has been held to revoke an earlier disposition of the same property." That the Lord Chancellor, so far at all events as the English authorities are concerned, was there referring only to cases where the infirmity in question was that of the instrument, and was not to be found in the incapacity of the legatee is, I think, shown not only by the fact that it was an infirm instrument that was then in question, but also by the fact that amongst the cases cited to the House was that of *Onions* v. *Tyrer* (2), with its elaborate note in which at least three cases to the effect stated, where the infirmity was due to the incapacity of the legatee, are set forth and relied upon. It is noticeable, too, that Lord Hatherley's observations in the same case are confined to the first class of cases, and that he himself had recognized the distinction just alluded to in *Tupper* v. *Tupper* (3) above cited. Feeling for these reasons, the difficulty in the way of reaching the same conclusion on more general grounds of principle, I am glad to find, in the special but limited provision as to revocation contained in this codicil, warrant enough for adopting, as I very readily do, the conclusions at which your Lordships have arrived.

(1) L. R. 2 H. L. Sc. 397, 403.
(2) 1 P. Wms. 343.
(3) 1 K. & J. 665.

H. L. (E.) WARD AND OTHERS *v.* VAN DER LOEFF AND OTHERS.

1924

WARD *v.* VAN DER LOEFF.

BURNYEAT *v.* VAN DER LOEFF.

Orders of the Court of Appeal in part complained of discharged and judgment of P. O. Lawrence J. restored. The costs of all parties in the Courts below and in respect of the appeal to this House as between solicitor and client to be paid out of the testator's residuary estate. Cause remitted to the Chancery Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 21, 1924.

BURNYEAT *v.* VAN DER LOEFF AND OTHERS.

The order in this case was identical with the previous order except that it related to one only of the orders of the Court of Appeal.

Solicitors for the appellants in the first appeal: *Sharpe, Pritchard & Co., for North, Kirk & Co., Liverpool.*

Solicitors for the appellant in the second appeal: *Beachcroft, Hay & Ledward, for Brown, Auld & Brown, Whitehaven.*

Solicitors for the respondents: *Beachcroft, Hay & Ledward.*

Russell v. *Russell* - [1924] A. C. 687
Referred to. Goss *v.* Goss
[1948] P. 15
[HOUSE OF LORDS.]

RUSSELL . . . . . APPELLANT ; H. L. (E.)*

1924

AND

May 30.

RUSSELL . . . . . RESPONDENT.

Divorce—Adultery—Birth of Child—Legitimacy—Evidence by Husband of Non-access—Admissibility.

The rule of law that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock applies to proceedings instituted in consequence of adultery and is not affected by 32 & 33 Vict. c. 68, s. 3, which makes the parties to such proceedings, and the husbands and wives of such parties, competent witnesses.

So *held* by Earl of Birkenhead, Viscount Finlay and Lord Dunedin; Lord Sumner and Lord Carson dissenting.

Order of the Court of Appeal [1924] P. 1 reversed.

APPEAL from an order of the Court of Appeal (1), dismissing an appeal from a decree nisi for divorce pronounced by Hill J.

On November 17, 1921, the respondent, the Hon. John Hugo Russell, presented a petition for the dissolution of his marriage with the appellant, Christabel Hulme Russell, on the ground of her adultery with a man unknown, in consequence of which adultery the appellant gave birth, on October 5, 1921, to a male child of which the respondent was not the father, and also on the ground of her adultery with a named co-respondent. Afterwards a second co-respondent was added.

At the hearing of the suit before the President and a special jury, the jury found the appellant not guilty of adultery with the two named co-respondents, but they disagreed as to the charge against the unknown man. The President accordingly dismissed the co-respondents from the suit, and ordered that the case should go back into the

* *Present:* EARL OF BIRKENHEAD, VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER, and LORD CARSON.

(1) [1924] P. 1.

H. L. (E.) 1924 RUSSELL v. RUSSELL.

list for trial on the issue of adultery with an unknown man. Before the case came on again for hearing another co-respondent was added.

At the further hearing before Hill J. and a special jury it was admitted that the husband and wife occupied the same bed on December 18 and 19, 1920, and the medical evidence was to the effect that the child might have been conceived on one of those two nights. The husband (the respondent) was called to give evidence as to what happened on those two occasions. The appellant's counsel objected that evidence by the husband of non-access, when there was an opportunity of access, was inadmissible to prove that the child was not his child and that therefore the appellant had committed adultery; but the objection was overruled. The respondent then gave evidence that he had no connection with the appellant on either of the two nights in question or at any time when the child could have been conceived.

The jury found that the appellant was not guilty of adultery with the named co-respondent, but that she had committed adultery with an unknown man. The learned judge dismissed the co-respondent from the suit and granted the petitioner a decree nisi on the ground of the adultery with the unknown man.

The Court of Appeal (Lord Sterndale M.R., Warrington and Scrutton L.JJ.) upheld the verdict and the decree nisi and dismissed the appeal.

The appeal to the House of Lords was based upon three grounds: (1.) That the verdict was against the weight of evidence. (2.) Misdirection. (3.) That the husband's evidence of non-access was inadmissible.

Their Lordships, in the course of the argument, came to the conclusion on the facts that the first point had been definitely abandoned by the counsel who represented the appellant in the Court of Appeal and that the judgments of the Court proceeded on that basis. They therefore held that the point was not open to the appellant. They also held that there had been no misdirection. The arguments are reported on the third point only.

1924. March 20, 21, 24, 25. *Stuart Bevan K.C.* (with him *Cotes-Preedy*, *F. J. de Verteuil* and *T. J. O'Connor*) for the appellant. The husband's evidence of non-access was wrongly admitted. It is an old established rule of law that it is not open to the husband or wife to give evidence of non-access, or of circumstances tending to prove non-access, to bastardize a child born in wedlock, and this rule was stated by Lord Mansfield in *Goodright* v. *Moss* (1) to be "founded on decency morality and policy." That was an action of ejectment, and it raised incidentally the question of the legitimacy of the plaintiff's lessor. It is sufficient for the purposes of the present appeal to establish that neither husband nor wife is a competent witness to prove that no connection took place between them when they were occupying the same bed, and that therefore the offspring is spurious. But the authorities go far beyond that. *Rex* v. *Sourton* (2) shows that neither husband nor wife can be examined as to non-access, or as to circumstances from which non-access may be inferred, where the legitimacy of a child born after marriage is in issue. That case related to the settlement of a pauper infant, the question of which of two parishes should be responsible for the maintenance of the child depending on the question whether the child was legitimate or not. That decision involved no question of decency, but it may be justified on grounds of public policy. In *Rex* v. *Kea* (3), which was also a pauper settlement case, it was held that a wife could not give evidence to bastardize her issue though her husband was dead, and that decision was avowedly based "on the broad ground of public policy affecting the children born during the marriage as well as the parties themselves"—i.e., the parties to the marriage. In the *Aylesford Peerage Case* (4), decided after the passing of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), which, by s. 3, makes the parties to any proceedings instituted in consequence of adultery, and the husbands and wives of such parties, competent witnesses, it was held

(1) (1777) 2 Cowp. 591, 592, 594.
(2) (1836) 5 Ad. & E. 180, 188, 189.
(3) (1809) 11 East, 132.
(4) (1885) 11 App. Cas. 1, 11.

H. L. (E.) 1924 RUSSELL v. RUSSELL.

that certain letters of the wife were admissible as part of the res gestæ; but Lord Bramwell recognized that the old rule of law still remained in force, it being a positive rule of law and not expressly abrogated by statute. Again, in the *Poulett Peerage Case* (1) Lord Halsbury expressly affirmed the principle laid down by Lord Mansfield, though he held that it had no application where the question was as to the legitimacy of a child born six months after marriage. The law is correctly laid down in Taylor on Evidence, 11th ed., vol. i., § 950, where it is shown that the old rule of law has not been superseded by recent legislation. [He also referred to Co. Litt., 19th ed., vol. ii., p. 244A.] *In re Rideout's Trusts* (2) and *In re Yearwood's Trusts* (3), if and so far as they decide the contrary, are wrongly decided and are inconsistent with Lord Bramwell's statement of the law in the *Aylesford Peerage Case.* (4) So also in *Guardians of Nottingham* v. *Tomkinson* (5) Grove J., whose opinion appears to have been accepted by Kay J. in *In re Walker* (6), was wrong in supposing that the old rule of law was superseded in proceedings instituted in consequence of adultery. *Morris* v. *Davies* (7) shows that in certain cases the presumption of legitimacy in the case of a child born in wedlock may be rebutted by the subsequent conduct of the parties, but that does not touch this case. See also the *Banbury Peerage Case* (8); Le Marchant's Barony of Gardner; *Hawes* v. *Draeger.* (9) Nevertheless, if a wife is living in adultery at the same time that she is living with her husband, and a child is born, the presumption is that the child is the child of the husband: *Gordon* v. *Gordon.* (10) Then as to the effect of the Act of 1869. That legislation was directed, not to altering any common law rule of evidence, but to making the husband and wife competent witnesses in a divorce suit. In the early part of last century persons having any interest in the subject matter of the litigation

(1) [1903] A. C. 395.
(2) (1870) L. R. 10 Eq. 41, 44.
(3) (1877) 5 Ch. D. 545.
(4) (1885) 11 App. Cas. 1, 11.
(5) (1879) 4 C. P. D. 343, 349.
(6) (1885) 53 L. T. 660, 663.
(7) (1837) 5 Cl. & F. 163.
(8) (1811) 1 S. & S. 153.
(9) (1883) 23 Ch. D. 173, 178.
(10) [1903] P. 141.

were incompetent witnesses, but by a series of Acts of Parliament different classes of persons whose testimony as witnesses might be affected by their interest in the proceedings were emancipated. These statutes, however, were directed solely to the personality of the witnesses and not to the nature or quality of the evidence to be given by them. They were designed to remove all disability founded on interest until at length the parties themselves, and the husbands and wives of the parties, became competent witnesses. [He referred to 3 & 4 Will. 4, c. 42, s. 26; 6 & 7 Vict. c. 85, s. 1; 9 & 10 Vict. c. 95, s. 83; 14 & 15 Vict. c. 99, ss. 1, 2, 4; 16 & 17 Vict. c. 83, ss. 1, 2, 3.]

The legitimacy of the child in this case was no less a direct issue involved than it was in the property cases and the pauper settlement cases already cited. The only issue before the jury was, Who was the father of the child? and they had found that an unknown man was. The effect of the husband's evidence was to bastardize the issue exactly in the same sense as in *Goodright* v. *Moss.* (1) The Master of the Rolls decided that that case was to be disregarded, because here the direct issue was not legitimacy but adultery, and that the effect of the Act of 1869 was to allow the husband to give all relevant evidence. The relevancy of the evidence is not denied, but it would be equally relevant in legitimacy proceedings, where it is not contended that it would be admissible. Further, the Master of the Rolls misunderstood the meaning of the word "decency" as used by Lord Mansfield. He was using the word in regard to the relations between husband and wife and not qua the public. If the Court of Appeal were right in the effect which they gave to the Act of 1869, that involved that the old common law rule was abrogated, but there is no justification for so construing the Act. The presumption is that in the absence of express language an Act of Parliament does not intend to abrogate ordinary rules of law: Halsbury's Laws of England "Statutes" (Interpretation), § 278. The general rule of law applicable here extends to cases in which husbands

(1) 2 Cowp. 591, 592, 594.

H. L. (E.) 1924 RUSSELL v. RUSSELL.

and wives are made admissible witnesses, and the only effect of s. 3 of the Act of 1869 was to relieve the parties from disability by reason of their interest in the subject matter. What is there in the Act which permits the husband to give evidence in the Divorce Court which he is precluded by a rule of law from giving in any other Court ?

Sir Douglas Hogg K.C. and *Sir Edward Marshall Hall K.C.* (with them *R. F. Bayford K.C.* and *Hon. Victor Russell*) for the respondent. The only question is whether or not there is a rule of English law which prevents evidence being given by the parties who were best able to give evidence that there was no intercourse between them when the child was conceived. For a great number of years the law was believed to be that if a child was born in wedlock, and the husband was within the four seas at any time between the possible period of conception and the birth of the child, the child was presumed to be legitimate : Co. Litt., vol. ii., 244A ; Viner's Abridgement, 2nd ed., vol. iv., p. 216. That rule depended on the feudal law and was designed to secure certainty as to the person to perform the feudal services, and it is now exploded. *The Banbury Peerage Case* (1) and *Morris* v. *Davies* (2) show that the illegitimacy of a child born in wedlock may be proved, just as any other fact may be proved, except that there is a presumption in favour of legitimacy. Further, at the time when the old cases on which the rule was founded were decided the common law Courts had no jurisdiction at all in matrimonial cases. By the law of England the husband and wife were one person and the common law Courts could not interfere ; and that remained the law until the passing of the Matrimonial Causes Act, 1857. *Goodright* v. *Moss* (3) was an ejectment action in which the right of the plaintiff depended on the question whether his lessor was legitimate or was born before marriage. Certain declarations of the father and mother were tendered at the trial and were rejected and a rule nisi was obtained to reverse that decision. Lord Mansfield said that the law of England was clear that

(1) 1 S. & S. 153. (2) 5 Cl. & F. 163.
(3) 2 Cowp. 591.

the declarations of a father or mother could not be admitted to bastardize the issue born after marriage, but he held that the declarations should be admitted. Therefore this was dictum only, but it must be accepted as an expression of opinion of great weight. In a subsequent passage Lord Mansfield showed that he regarded it as indecent and against public policy that the legitimacy of a child born in wedlock should be called in question. The indecency must consist in investigating the relations of husband and wife, and the question of decency cannot depend on whether or not there is a child born in wedlock. The real foundation for Lord Mansfield's opinion must be public policy. Of the cases from which Lord Mansfield says the rule is to be deduced, *Rex* v. *Reading* (1) shows that in a pauper settlement case the wife could not be the sole witness of the absence and want of access of her husband. There Lord Hardwicke was deciding not that it was against public policy to investigate the relations of the spouses, but that the wife should not be allowed to discharge the husband from the burden of maintaining the child, and he only decided that the wife must not be sole witness. That decision turns on interest. *Rex* v. *Rook* (2) followed Lord Hardwicke's decision. *Rex* v. *St. Peter's* (3) shows that the rule was founded on the interest of the parties and accordingly, though the evidence of a married woman ought not to be admitted to discharge her husband, yet the evidence of the reputed father was admitted to prove the bastardy of the children after the mother's death, because he was equally bound to maintain the child whether he were legitimate or not. *Rex* v. *Stockland* (4) and *Hiliard* v. *Phaly* (5) carry the matter no further. The principles underlying these cases are (1.) that there is a presumption in favour of the legitimacy of a child born in wedlock and (2.) that neither husband nor wife should be allowed to give evidence which would tend to discharge the husband from the duty of maintaining the child. As to the cases

(1) (1734) Cas. temp. Hard. 79, 82.
(2) (1752) 1 Wils. 340.
(3) (1735) Burr. Settlemt. Cas. 25.
(4) (1762) Burr. Settlemt. Cas. 508.
(5) (1722) 8 Mod. 180.

H. L. (E.) 1924 RUSSELL v. RUSSELL.

subsequent to *Goodright* v. *Moss* (1): In *Rex* v. *Luffe* (2) Lord Ellenborough said that the objection to admitting the evidence of the wife as to non-access was grounded upon a principle of public policy which prohibited the wife from being examined in any matter affecting the interest or character of the husband. In *Rex* v. *Kea* (3) there is a suggestion of an extension of this principle, as the ground of public policy on which the rule was based was there stated to be one "affecting the children born during the marriage as well as the parties themselves." In *Rex* v. *Sourton* (4) the ground of the rule was not stated, but the inference is that it was based upon *Goodright* v. *Moss*. (1) In all these settlement cases the judgment was conclusive as to the status of the child—it was a judgment in rem: *Reg.* v. *Wye*. (5) That is how the matter stood down to the passing of the Evidence Amendment Act of 1869. The result of these authorities is that where the issue was the legitimacy of a child born in wedlock—where that was one of the facta probanda—neither husband nor wife was permitted to prove non-access so as to bastardize the child, and the ground of public policy on which that rule was based was that neither spouse could be allowed to give evidence which would relieve the husband of his liability to maintain the child. That principle no longer applies. Reliance is placed on a dictum of Lord Halsbury in the *Poulett Peerage Case* (6), where he bases the rule on the principle of protecting the sanctity of married intercourse, but that was in fact a legitimacy case. If that is the foundation of the rule it has never yet been applied to a case in which the object of the suit is to dissolve the marriage tie, it is only applied where there is a marriage in existence and the legitimacy of a child born in wedlock has in some way come in question. The Courts have always treated this rule as inapplicable to matrimonial suits where the whole object of the evidence is to prove that the sanctity of marriage has been violated and that the marriage should be dissolved.

(1) 2 Cowp. 591.
(2) (1807) 8 East, 193, 203.
(3) 11 East, 132.
(4) 5 Ad. & E. 180.
(5) (1838) 7 Ad. & E. 761, 769.
(6) [1903] A. C. 395, 399.

In the Divorce Court it is a matter of constant occurrence for the husband to prove non-access. So also in nullity suits, the evidence of the spouses as to their matrimonial relations has always been held to be admissible since the Act making the parties competent witnesses: *F.* v. *D.* (1); *Cuno* v. *Cuno.* (2) Nor does the rule apply where the defence of condonation is set up: *Rowell* v. *Rowell.* (3) Again, in a wife's suit for desertion evidence by the husband of the wife's refusal of marital intercourse was admitted: *Synge* v. *Synge.* (4) See also *Gaskill* v. *Gaskill* (5), where the charge of adultery was based solely on non-access for 331 days. So in cases of cruelty, affecting the wife with venereal disease, the evidence of the marital relations is admitted. Ever since it has been possible for the parties to give evidence in matrimonial suits evidence as to sexual intercourse having taken place or not having taken place has been given without exception, although, if the ground of the rule is that the sanctity of married life is to be protected, such evidence would have been inadmissible. In all cases since 1869 in which the rule has been applied it has been expressly stated that the proceedings were not proceedings relating to adultery. There is also a uniform current of opinion in the text-books that the rule has no application to proceedings in the Divorce Court: Stephen's Digest of the Law of Evidence, 10th ed., pp. 114, 127; art. 98; Powell's Law of Evidence, 10th ed., p. 124; Phipson's Law of Evidence, 6th ed., p. 199. In *Hetherington* v. *Hetherington* (6) Sir J. Hannen in discussing the application of the rule draws the distinction between cases where the issue is bastardy and where it is adultery. It is conceded that there is nothing in this case which can be used against the child in proceedings to establish his succession.

[LORD DUNEDIN. But the only reason for the decree nisi is based on the fact that the husband was not the father of the child. Then this extraordinary result must follow that

(1) (1865) 4 Sw. & T. 86.
(2) (1873) L. R. 2 H. L. Sc. 300.
(3) [1900] 1 Q. B. 9, 13.
(4) [1900] P. 180; [1901] P. 317.
(5) [1921] P. 425.
(6) (1887) 12 P. D. 112, 114.

H. L. (E.) 1924 RUSSELL v. RUSSELL.

for the purpose of his succession the child will be held to be legitimate, though all the world would believe him to be illegitimate.]

It is not more extraordinary than finding that the wife has committed adultery with the co-respondent, but that the co-respondent has not committed adultery with her. The rule is confined to the class of case in which it had its origin, and has no application to a class of case which at that time was not known. Where the issue is adultery the birth of a child is a mere accident. The important fact is that the child was conceived at a time when the wife was having no relations with her husband. Suppose a miscarriage. Is the evidence to be excluded then? The application of the rule cannot depend on such accidents as that.

Stuart Bevan K.C. in reply referred to *Welde* v. *Welde* (1) and *Greenstreet* v. *Cumyns*. (2)

The House took time for consideration.

1924. May 30. EARL OF BIRKENHEAD. My Lords, this long drawn-out litigation has been so much reduced in the course of its passage through the Courts that only one main issue, and that of law, survives.

There are, it is true, matters, relatively of less importance, which are still material and upon which a conclusion must be recorded. But these do not involve much research or difficulty when a decision has been reached upon the question which is fundamental.

The appellant appeals here against the decision of the Court of Appeal declining interference with the finding of the jury that the appellant had committed adultery with a man unknown. I ignore the changing details and recriminations which the two long hearings disclosed. For, in my opinion, these no longer possess any relevance.

My own impression may be stated at once, that unless the evidence given by the husband, the petitioner, was in law receivable there was no evidence of adultery proper

(1) (1731) 2 Lee, 580. (2) (1812) 2 Phill. Eccl. Rep. 10.

to go to the jury at all. But I am willing to hear argument upon the point. The question, therefore, if I am right, which your Lordships have to decide is whether or not by the law of England evidence of non-access may, in proceedings for divorce, be tendered by a spouse and received by a Court with the object or possible result of bastardizing a child of the marriage.

I have formed the clear opinion that such evidence is not receivable; that it ought not to have been allowed to go to the jury; and that therefore, unless there was other evidence proper to go to them, the verdict cannot stand.

The importance of the matter renders proper some slight examination of the history of the legal considerations involved, though I do not, for reasons which will appear, think an exhaustive inquiry necessary.

The leading case on the subject (*Goodright's Case* (1)) was decided by Lord Mansfield in the year 1777. The facts of the case are not important; but this great judge laid down the law, at two separate stages of the hearing, with characteristic lucidity.

The first passage, which was interlocutory, was as follows: "The law of England is clear, that the declarations of a father or mother cannot be admitted *to bastardize the issue born after marriage.*"

In the second passage he said: "As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule founded on decency, morality and policy that they shall not be permitted to say after marriage, that they had had no connection, *and therefore that the offspring is spurious;* more especially the mother, who is the offending party. That point was solemnly determined at the Delegates."

This learned judge founds himself (and he was very careful in such matters) upon the "solemn determination" of the Delegates who, as is well known, prior to the Act 2 & 3 Will. 4, c. 92, constituted the Supreme Ecclesiastical Court of Appeal.

(1) 2 Cowp. 591, 592, 594.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Earl of Birkenhead.

We approach the matter in this House without responsibility for the genesis of the rule. We have not to ask whether we should ourselves have laid it down; still less to consider whether changed social conditions have undermined its authority. We find the rule living and authoritative. We find its application to legitimacy proceedings everywhere conceded. Our task therefore is to determine whether evidence inadmissible in such proceedings is admissible in Divorce. It is a simple, a limited, but an important task.

The rule as laid down is not limited to any special class of case. It is absolutely general in the comprehensiveness of its expression. It has no geographical qualification. It does not, for instance, lay down that where husband and wife are present in the same bed; the same bedroom; the same house; or the same town, the evidence must be repelled; but that it may on the other hand be received if the husband has (for instance) been absent from the country for twelve months before the birth of the child. It says, upon the contrary, that such evidence shall not be given at all; and the reason given is that it would tend, if given, to bastardize the issue and to invade the very special sanctity inherent in the conjugal relation; and the reason is assigned which led first the Delegates and then the ordinary Courts to a conclusion so widely expressed. It is a reason founded upon "decency, morality, and policy." This passage from the judgment of Lord Mansfield has not the meaning ascribed to it by the Court of Appeal. Indeed upon this point the Lords Justices went strangely wrong.

Lord Sterndale, for instance, said (1): "Morality and decency in Lord Mansfield's judgment seem to me to come to the same thing. Now decency is very difficult to apply in Divorce Court, and for this reason, that from the very *nature* of proceedings there evidence must constantly be given that is perfectly loathsome to the ordinary mind." And Warrington L.J. said: "With regard to decency, when we have to consider the proceedings in the Divorce Court

(1) These quotations are taken from the Appendix.

it is strange that we should be asked to exclude some particular item of evidence on the ground that to admit it would be contrary to the principles of decency."

Lord Mansfield was not concerned with the grossness or indecency of the subject matter which the reception of such evidence might involve. Nor indeed ought any judge, who understands his business, to trouble his head as to the indecency of evidence if its examination be required for the elucidation of truth. No Court is contaminated by examining any facts, or reviewing any language, which the administration of justice requires. Judges must do their duty, sacrificing if necessary their delicacy in the process. What Lord Mansfield meant was that a deeply seated domestic and social policy rendered it unbecoming and indecorous that evidence should be received from such a source; upon such an issue; and with such a possible result.

A long series of later decisions, of which I shall only examine two, has confirmed and restated the rule as laid down in *Goodright*. (1) The first case, *Rex* v. *Kea* (2), was one of those familiar pauper settlement cases in which it became necessary to determine whether a child was legitimate or not, in order to provide him or her with the legal parish of settlement.

It was tried in the year 1809.

It was therein laid down that a woman cannot give evidence of the non-access of her husband so as to bastardize her issue, even though the husband had died before the date of her examination as a witness.

Lord Ellenborough C.J., when the case was called for hearing, said that the evidence recommended would be in direct contradiction to the decision in *Rex* v. *Reading* (3) and other cases. The principle of public law precluded the wife from being a witness to the effect of the non-access of the husband.

The other members of the Court signified their concurrence with this opinion.

(1) 2 Cowp. 591. (2) 11 East, 132. (3) Cas. temp. Hard. 79.

H. L. (E.) 1924 — RUSSELL v. RUSSELL. — Earl of Birkenhead.

The argument of counsel who appeared to support the order of Sessions was in itself very significant. They said that this case was distinguishable from others, because the husband was dead at the time when the wife was examined; and therefore if the rule stood merely on the ground that the giving of such testimony was calculated to promote dissension between husband and wife, it would have ceased to apply in this instance, where one of the parties was dead; but if the Court considered that the rule stood on the broad ground of general public policy, affecting the children born during the marriage as well as the parties themselves, they could not pretend to argue in support of the order.

The Court unanimously assented to this broad statement of the rule; affirmed its re-statement in the terms proposed, and discharged the order of Sessions accordingly.

In the *Poulett Peerage Case* (1) Lord Halsbury made the following observations upon this point: "My Lords, I can only say for my own part as regards the rule which I think most wisely and properly protects the sanctity of married intercourse; and forbids it to be enquired into *in any Court of Law*. . . . . ." I omit as irrelevant what follows. But rightly understood the dictum was not obiter.

It is not then disputed that the rule existed, and was of the highest authority. But two main contentions are advanced to repel the case made by the appellant.

It is replied in the first place that the rule only applied to legitimacy proceedings properly so called.

And it is replied in the second place that the Act of 32 & 33 Vict. c. 68, s. 3, has rendered evidence of non-access admissible in such cases.

In my opinion both these contentions fail.

I find nowhere in any of the cases which were elaborately cited before us any authority for the suggested limitation. And by reference to what principle (and we are after all dealing with principles) is such a distinction to be drawn? When we are told that a rule is founded upon public policy, decency, and morality, it would seem natural to propose it in

(1) [1903] A. C. 395, 399.

all cases to which it applies verbally, provided that we are still able to bring ourselves within the public considerations which were the expressed basis of the rule. If, for instance, in an issue where the child himself is a party—a legitimacy proceeding in rem in the true sense—it is against public policy to admit the evidence of a parent to prove the bastardy of that child, why should an entirely different policy permit such evidence in the case where a vital issue is still the legitimacy of the child, even though it be raised for a different purpose, and perhaps with secondary emphasis? Nor ought we to shut our eyes to the glaring absurdity in which a different decision would involve the administration of this branch of the law. This evidence, we are told, is admissible in Divorce; being therefore so received it bastardizes the child. But if and when the child, as in this case he certainly will do, becoming of age, applies for his writ in this House, and proceedings follow, the evidence will not be admissible and he will be pronounced legitimate. Equally, of course, if the child instituted proceedings to-morrow for a declaration of legitimacy we should be afforded the agreeable prospect of holding judicially in 1924 that the infant was illegitimate; and in 1925 that he was legitimate. Nothing but absolute necessity, founded upon decisions binding upon me, would drive me to a conclusion so ludicrous and incongruous. I find here no such necessity. On the contrary, by adhering to an ancient rule of the highest authority, in its natural and ordinary meaning; adding nothing to it; but giving full effect to the terms in which it has been expressed, I am able to avoid an inconsistency which would rightly bring the law into disrepute.

It was urged by counsel that similar discrepancies of decisions were to be found in the Divorce Court; that A., for instance, might be found guilty of adultery with B.; and B. in the same proceedings found innocent of adultery with A. This contingency, the logical basis of which I carefully examined in *Rutherford* v. *Richardson* (1), has nothing in common with the consequences I am contemplating here.

(1) [1923] A. C. 1.

H. L. (E.) 1924

RUSSELL v. RUSSELL.

Earl of Birkenhead.

A reference to my judgment in that case will, I believe, make the matter plain.

It remains only to notice one other argument which arose in this part of the case. It is said that the view recommended above will revolutionise the practice of the Divorce Court. And my attention was called to the fact that in an undefended divorce case which I myself tried at Nisi Prius I had admitted evidence of non-access, bastardizing the issue, and given by a soldier petitioner. The matter was not argued; so that my attention was not directed to the point. With argument, I am sure that I should have reached my present conclusion. In such cases the non-access can almost always be established aliunde. If it cannot be so proved the practice of the Divorce Court must accommodate itself to the authority of the rule. If the inconvenience (contrary to my expectation) proves intolerable the Legislature, if it thinks proper, may provide a remedy. Holding the views which I express in this opinion I find it no part of my duty to do so.

I have only now to consider whether s. 3 of the Act of 1869 has affected the validity of the doctrine.

The section runs as follows: "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to say that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

I am myself quite unable to understand how this section can have the effect assigned to it by the Court of Appeal. It makes indeed the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, competent to give evidence in such proceeding. What in effect does it make such persons competent to do? Plainly and only, I should have thought, to give such testimony as the law of evidence allowed at that date or, as

afterwards modified, that law may allow. It did not, and it did not purport to, alter any existing rule of evidence except that which dealt with the actual competency to give evidence at all. I cannot follow upon this point the reasoning of the late Master of the Rolls.

That distinguished judge made the following observations upon the subject: "I agree that the statute did not make" (the parties) "competent to give any sort of evidence, whether it was according to the rules or not; it enabled them to give evidence subject to the restrictions as to what could be given that apply to any other witness; therefore, for instance, hearsay could not be given by those parties. But *subject to that* it seems to me that the result of making them competent witnesses in a proceeding instituted in consequence of adultery made them witnesses who could give evidence on any matter which was relevant to the issue to be tried; that issue being whether the respondent had or had not committed adultery."

With the greatest possible respect for this lamented judge, I think that the whole of the passage which I have quoted involves a confusion of thought. When the old rule was applied, before the statute came into existence, the evidence under consideration was not excluded upon the ground that it was irrelevant. It was excluded, and was expressed so to be, in obedience to deeper implications of social policy. Those implications evidently still survive; and it is therefore as unimportant to-day, as it would have been before the statute, to insist that the evidence if it were allowed (which it is not) would be relevant. The *Aylesford Peerage Case* (1) was decided after this Act became law. Certain letters of the wife raising the present issue were admitted as part of the res gestæ. But both Lord Selborne and Lord Bramwell, with the statute before them, made it plain that they would not have admitted the letters as evidence of any fact.

It is worth noticing that the supposed effect of the statute furnished the ratio decidendi in the Court of Appeal. The judgments of that Court therefore, if wrong upon that point,

(1) 11 App. Cas. 1.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Earl of Birkenhead.

contribute little or nothing to the problem before us. The view that in this particular they were right was not very strenuously argued by counsel; and has not, I believe, commended itself to many of your Lordships.

The conclusions, therefore, which I reach upon the whole matter are: firstly, that the rule as laid down by Lord Mansfield, and other great judges, is a general rule to be applied, in the full generality of its scope, to all cases which it is wide enough to cover; secondly, that the Act of 1869 has not affected the rule in any way. The witnesses indeed have become competent, but still they may not give this evidence, for the law does not allow it.

I am therefore of the opinion that this verdict cannot stand, and I move your Lordships accordingly.

VISCOUNT FINLAY. My Lords, in this case the husband filed a petition for dissolution of marriage on the ground of adultery. Para. 6 of the petition is as follows: "That the said Christabel Hulme Russell has committed adultery with a man unknown to your petitioner, in consequence of which adultery the said Christabel Hulme Russell gave birth, on the 5th day of October, 1921, to a male child, of which the said man unknown, and not your petitioner, is the father." Adultery was also charged with certain named co-respondents.

The case has been tried twice. On the first trial the jury negatived the allegations of adultery with the named co-respondents (who were dismissed from the suit), but were unable to agree on the issue as to adultery with a man unknown.

Before the second trial the petition was amended by alleging adultery with one Mayer and the case was tried again before Hill J. with a special jury. The jury found that adultery had been committed with a man unknown, but not with Mayer. Mayer was dismissed from the suit, and a decree nisi was granted on the ground of adultery with a man unknown.

The wife moved in the Court of Appeal that the verdict

should be set aside and the petition dismissed, or alternatively, that a new trial should be had on the grounds (1.) that the verdict was against the weight of evidence; (2.) that there was no evidence on which the jury could find adultery; (3.) that the learned judge was wrong in law in admitting the evidence of the petitioner that intercourse did not take place between the husband and the respondent; and (4.) on the ground that there was misdirection and insufficient direction.

The ground that the verdict was against the weight of evidence was abandoned in the Court of Appeal by counsel for the wife, and this House has for that reason refused to entertain the appeal on that ground.

The case was argued in the Court of Appeal on the question whether the evidence of the petitioner was wrongfully admitted, as alleged in the third ground above mentioned, and the appeal was dismissed, the Court of Appeal holding that the evidence had been rightly admitted, and that there was evidence of adultery. The ground that the verdict was against the evidence was, as I have said, abandoned, and the Court of Appeal held that there was no misdirection. The case now comes before your Lordships' House on the wife's appeal, and the substantial question is whether the evidence of the respondent as to non-access to his wife was rightly admitted.

This is purely a question of law. The inquiry falls under two heads: (1.) as to the law of England on this subject as to such evidence before the passing of the Act of 1869 making the parties to proceedings in consequence of adultery admissible as witnesses; and (2.) as to the effect of that Act upon the law in this particular.

There is a strong presumption that the child of a married woman was begotten by her husband. This, however, is not a presumption juris et de jure; it may be rebutted by evidence. The fact that the wife had immoral relations with other men is not of itself sufficient to displace the presumption of legitimacy; non-access by the husband at the time when the child must have been begotten must

H. L. (E.) 1924 RUSSELL v. RUSSELL. Viscount Finlay.

(unless there be incapacity) further be proved. Proof of non-access cannot be given for this purpose either by the husband or by the wife; neither of them can be asked any question tending to prove such non-access; it must be established entirely by the evidence of other witnesses.

The rule is one of public policy, and is not confined to cases in which the evidence would have been of an indecent nature. Though the fact that the husband was not the father of the child is to be established by showing that at all material times the husband and wife were living in different places, or in different countries, and never met, neither husband nor wife can give evidence to that effect.

Very good reasons could be given for respecting the sanctity of married life in this matter, to use the phrase employed by Lord Halsbury in a case to which I shall have occasion to refer further on. But the rule is absolute, and wisely so. It is not decent that husband or wife should give evidence to bastardize the issue of the wife during the marriage, however decorous the evidence might be in itself. It cannot be admitted, irrespective of the fact that if it were admitted it might run into details of a positively indecent character, such as were found in the present case.

The rule has been recognized in a great variety of cases. There is no ground for the suggestion that it is confined to cases in which it is sought to establish legitimacy or illegitimacy as a matter of status by proceedings in the nature of proceedings in rem. It applies in every case in which, for any purpose, it becomes necessary to determine the question whether a child born of the wife during the marriage is the child of the husband. And the same rule applies to declarations on the subject of the paternity of the child made by the husband or the wife out of Court just as much as to evidence given in Court. It has been applied in many cases; for example, in actions of ejectment, when the title depended on the legitimacy of a particular person—in cases as to the parish of settlement of paupers, which might depend on a question as to the legitimacy of an infant pauper—in peerage cases, in which the right to the peerage

depended on the question of the legitimacy of a child born of a married woman.

It is now suggested that the establishment of the Divorce Court and the Act of 1869, allowing parties to proceedings in consequence of adultery to give evidence, have changed the rule of evidence as to proof of non-access. But before dealing with this part of the case it is essential to consider the authorities as to the law of England, apart from that statute, as settled by a series of decisions. It will be found that the law of England excluded evidence such as was admitted in the present case.

In the year 1777, Lord Mansfield laid down the law on this point in the case of *Goodright* v. *Moss*. (1) The action was one of ejectment, and declarations by the parents of the lessor of the plaintiff—i.e., the real plaintiff—were offered to prove that he was born before the marriage of his parents. They were rejected by Eyre B., the judge who presided at the trial. A motion was made in the Court of King's Bench for a new trial on the ground that the evidence should have been admitted, and a new trial was granted. Lord Mansfield laid down the law with perfect clearness, first during the argument and again in the course of his judgment. He pointed out that there was no objection to evidence or declarations by the parents that a particular child had been born before marriage, whereas they could not give evidence to prove that offspring born after the marriage was spurious. In the course of the argument he said: "All the cases cited, are cases relative to children born in wedlock: and the law of England is clear, that the declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage. But here the evidence offered is only to prove the time when the issue was born; and to shew, whether it was before the marriage or after."

In the course of his judgment Lord Mansfield said: "As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule, founded on decency, morality and policy, that they shall not be

(1) 2 Cowp. 591, 592, 594.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Viscount Finlay.

permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party. That point was solemnly determined at the Delegates."

Lord Mansfield points out in these passages that the evidence tendered had been rejected owing to a misunderstanding and lays down the true rule. It is clear that the expression used in Lord Mansfield's observation during the argument, "bastardize the issue," is not confined to proceedings in the nature of a suit in rem to have a formal and binding declaration as to legitimacy or the reverse. The expression merely denotes giving evidence to show that the child is illegitimate, and this, in the case of a child after marriage, no parent can be admitted to give.

The same rule was applied where the question arose as to settlement of paupers.

The child of a married woman is prima facie legitimate. To displace this presumption it must be shown that the husband could not have been the father of the child, and this will be established if it be proved that there was no access by the husband during the period when, in the course of nature, the child must have been conceived. In a great many cases, efforts were made to show that the parish of settlement of the husband of a married woman should not be the parish of settlement of the child born by her, on the ground that the child was a bastard, in which case the parish of birth would have been ordinarily the parish of settlement of the infant. It was uniformly held that non-access for this purpose could not be proved by the testimony of the husband or the wife, and that their evidence could not be received on such a point.

In 1809 the question arose in the case of *Rex* v. *Kea*. (1) An order had been made by two justices for the removal of the pauper, a child of the age of seven years, to the parish of St. Evall, the parish where Pope, the husband of the mother, was legally settled. At the time of the birth, she was cohabiting in another parish with one Davey. She was called

(1) 11 East, 132.

as a witness before the justices to prove non-access by Pope, her husband, and the Sessions, on appeal, on her evidence reversed the order of removal to his parish of settlement, subject to a case stated to raise the question whether the evidence of the mother in proof of non-access of her husband ought to have been received. Lord Ellenborough ruled that this evidence was not receivable and that the principle of public policy prevented her from being a witness to that fact. The order of the Sessions was reversed and that of the justices restored.

In the year 1836, the point again arose as to the settlement of a pauper on a case stated by Sessions on an appeal against an order of the justices for the removal of a pauper from one parish to another: *Rex* v. *Sourton*. (1) The respondents relied on proof by the husband of the mother of the pauper of non-access for the purpose of proving illegitimacy. The Sessions stated that they were satisfied with the proof of non-access, if they were right in admitting the evidence of the husband (Tickle). The order was to be quashed if this evidence was inadmissible. The order was quashed by the Court of King's Bench on the ground that such evidence was inadmissible. The Court consisted of Lord Denman C.J., Littledale J., Patteson and Williams JJ. Lord Denman C.J. said: "It is desirable to shew, in a case of such importance as this, that we adhere to the old rule of law, without any doubt. The rule cited in 2 Starkie on Evidence, p. 139, note (*x*) (2nd ed.), from *Goodright dem. Stevens* v. *Moss* (2) (supported also by *Rex* v. *Kea* (3), cited in the same note), is that parties should not be permitted after marriage to say that they had had no connection. Then, it being clear and indisputable law that, for the purpose of proving non-access, neither husband nor wife can be a witness, the question is whether the circumstances of the present case bring it within that rule." He then goes on to say that Tickle, having been called for a different purpose, was cross-examined for the purpose of proving non-access, and

(1) 5 Ad. & E. 180, 187, 189, 190. (2) 2 Cowp. 591.
(3) 11 East, 132.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Viscount Finlay.

adds: "They" (the Sessions) "have, therefore, admitted the husband to prove what, by a rule of law, clear and undoubted and of obvious public utility, they could not receive as evidence from him. The order of Sessions must be quashed."

Littledale J. said that he agreed in the rule that neither the wife nor the husband ought to be called to prove non-access, and that it excluded all questions which had a tendency to prove non-access. He concluded his judgment by saying: "I think that the evidence was as much inadmissible as if the question had been put, whether or not the parties had had any connection."

Patteson J. agreed, and said: "It is trifling to say that all inquiries may be made of the witness, close up to the point of access or non-access, so that, by a variation of terms, the direct question on that subject be avoided."

Williams J. said that "non-access is a fact not to be proved by the husband or wife."

The point has often arisen on cases of controversy as to the right of succession to a peerage. The same rule to which I have already adverted as applying to questions of descent in actions of ejectment and of settlement of paupers has always been applied in proceedings of this nature before the Committee of Privileges.

Lord Halsbury refers to the existence of that rule in the *Poulett Peerage Case* (1) (Minutes of Evidence before the Committee of Privileges on the Poulett Peerage Case, pp. 53-54). The question there was whether Lord Poulett, the husband, could give evidence that he was not the father of a child of which his wife was found to be pregnant when she married him. It was decided that he could, and Lord Halsbury pointed out that the case was quite different from that of proving non-access during marriage. He said in the course of his opinion (p. 54 of Minutes): "My Lords, I can only say for my own part, as regards the rule which I think most wisely and properly protects the sanctity of married intercourse and permits it not to be

(1) [1903] A. C. 395, 398-9.

inquired into in any Court of law, it would be a gross perversion of that principle to say that, under the circumstances which I have suggested, the husband should not be at liberty to prove his own virtue at all events, and to prove that he had not induced the woman whom he was afterwards to make his wife to be guilty of the sin of fornication."

This is a very emphatic recognition of the rule of evidence in this matter by a great master of the law of evidence. The passage has been criticized at the Bar as too wide a statement of the rule. Such criticism seems to me to be mistaken. Lord Halsbury was dealing with a case in which the legitimacy of the child was in question, and pointing out the great difference between denial of intercourse during marriage and denial of intercourse before marriage.

In the *Aylesford Peerage Case* (1) letters of the wife were admitted in evidence before the Committee of Privileges as part of the res gestæ and evidence of conduct. Lord Selborne says: "But it is said that a declaration by the wife bearing directly upon the point, if occurring in such a letter, ought not to be received. I agree that it should not be received as direct evidence of the fact." But he was of opinion that the letter might be read as evidence of conduct.

Lord Bramwell says as to these letters: "As mere declarations by Lady Aylesford, of course they would not be admissible; they are only admissible as part of the conduct—part of the res gestæ."

It is unnecessary to labour this part of the case. It is beyond controversy that by the common law of England neither husband nor wife could give evidence of non-access after marriage for the purpose of showing that a child of the wife born during the marriage was illegitimate. Reference was made in the argument to the fact that Mr. Wills Q.C. admitted in the case of *Nottingham Guardians* v. *Tomkinson* (2) "that the husband's evidence would have been admissible except to bastardize his issue." The whole object of the

(1) 11 App. Cas. 1, 9, 11. (2) 4 C. P. D. 343, 346.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Viscount Finlay.

evidence in the present case is to bastardize the child so as to prove the adultery. The respondent's argument on this point rests on the misapprehension of the meaning of the term "bastardize" employed by Lord Mansfield in *Goodright* v. *Moss* (1), to which I have adverted in commenting on that case. The term covers all cases in which the evidence is given to prove the illegitimacy of the wife's child born during the marriage.

I pass to the question whether the rule has been altered by statute.

The respondent contends that, whatever was the old rule, the Act of 1869 (32 & 33 Vict. c. 68, s. 3) has rendered evidence of non-access by husband or wife admissible. [His Lordship read the section as set out p. 702, ante.]

The first observation to be made on this Act is that it is an Act to render the husband and wife competent witnesses. It leaves intact the law as to what evidence they may give; the proviso merely confers a certain immunity against questions tending to show that the witness has been guilty of adultery.

The question is one simply of the construction of the statute. The competency of persons to give evidence in a certain case has no bearing on the question of what evidence they may give. The Master of the Rolls said, in his judgment in this case (App., p. 637, A-B), that the statute did not make the husband and wife competent to give any sort of evidence, whether it was according to the rules or not: "it enabled them to give evidence subject to the restrictions as to what could be given, just like any other witness." This seems to me an accurate statement of the effect of the statute. He goes on to say, however, that he thinks they may in this case give evidence of non-access to prove the illegitimacy of the child, because the issue in the case is whether adultery was committed, and the evidence of non-access is given only to show that adultery must have been committed, as it was not begotten by the husband. The Master of the Rolls held that the rule is confined to cases in which legitimacy is

(1) 2 Cowp. 591.

the issue in the suit. I cannot assent to this limitation. Every reason for the rule is just as applicable to a case in which illegitimacy is proved to show adultery as it is to cases in which the inquiry is merely as to the status of the child. The limitation suggested is entirely novel. The rule does not exclude evidence by husband and wife of non-access universally; what it does exclude is such evidence given to prove the illegitimacy of a child born during the marriage. It has never been held that its applicability is confined to "legitimacy cases"—it applies to every case in which legitimacy is in dispute.

It was in an action of ejectment (*Goodright* v. *Moss* (1)) that Lord Mansfield laid down this rule. He said that declarations by the parents that the child had been born before marriage had been improperly rejected, and, when he stated the true rule as being that the declarations of a father or a mother cannot be admitted to bastardize the issue born after marriage, it is obvious that he was speaking of it with reference to the class of action which was before the Court. The settlement cases in which the rule was so often applied were not legitimacy cases in the sense in which the Master of the Rolls uses the term, they were merely cases in which the parish of settlement depended on legitimacy or illegitimacy, just as the title to land in ejectment may so depend. Such evidence has been always excluded not merely when the status of legitimacy is to be determined in proceedings for the purpose, but whenever the question of legitimacy arises in order to ascertain the right to land, to a parochial settlement, to a title, or to anything else. The rule applies to all evidence by husband and wife of non-access in order to show that a child born of the wife after marriage is illegitimate, As the Master of the Rolls said, the evidence which the husband and wife may give is subject to all legal restrictions, and one of these is that they cannot be called to disprove intercourse so as to bastardize the child.

Lord Bramwell in the *Aylesford Peerage Case* (2) made some observations which bear upon this question of the effect of

(1) 2 Cowp. 591.

(2) 11 App. Cas. 1, 7, 8, 11.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Viscount Finlay.

the statute of 1869. In that case there was a petition by the brother of the seventh Earl of Aylesford that he should be summoned to Parliament as having succeeded to the Earldom on the death of his brother. The petition was opposed on behalf of an infant son of the widow of the seventh Earl as entitled to the peerage. Letters written by her were tendered in evidence. Mr. Horace Davey K.C. on her behalf objected to their being admitted. He said: "These letters are said to contain statements as to the legitimacy of the child. It is clear upon the authorities that the mother not only could not be called to state the fact who the father of the child was, but could not be asked any collateral questions tending to prove or disprove that fact, for the rule extends equally to such collateral questions. Her statements or declarations are therefore equally inadmissible for the purpose of bastardizing the child"; and he referred to *Rex* v. *Inhabitants of Sourton.* (1) Lord Bramwell said that the rule excluding husband and wife was based on public policy and asked whether the rule exists now that by Act of Parliament husband and wife are admissible witnesses in divorce suits. The letters were admitted as part of the res gestæ. Lord Bramwell prefaced his judgment on the point by saying that he had raised a doubt as to whether the rule of law referred to by Mr. Davey was still in existence and added "That doubt is removed, not merely by the authorities cited by Mr. Davey, but also by the reason of the thing as put by him, that is to say, that it is a positive rule of law, and that it is not expressly abrogated by statute."

This is an expression of opinion by Lord Bramwell that the statute did not affect the rule as to proof of non-access. It may be that the statute of 1869 should not be treated as affecting such cases as the *Aylesford Case*, as not being a proceeding in consequence of adultery. But Lord Bramwell clearly was of opinion that the statute did not affect the rule against proving non-access either by the evidence or by the declarations of husband and wife. The other members of the committee (the Earl of Selborne and Lords Blackburn

(1) 5 Ad. & E. 180.

and Fitzgerald) assume for the purpose of their decision that the rule exists but express no opinion upon the effect of the statute.

This Act has been referred to in two cases arising in Courts of Equity.

In *Rideout's Trusts* (1) on a question as to distribution of estate the husband gave evidence that a respondent claiming to be entitled as one of the children of the marriage was born during the coverture, but alleged his illegitimacy on the ground of non-access. The third section of the Act was referred to. James V.-C. said he did not like to say that the effect of the statute was to supersede the old rule, and required other evidence of non-access, which was procured. It may be pointed out that the proceeding was not one in consequence of adultery, so that the Act did not apply; but we have the opinion of the Vice-Chancellor that it would not have altered the old rule.

In *Yearwood's Trusts* (2) Hall V.-C. discussed the decision in *Rideout's Trusts*, but I do not think that what was said by him throws light upon the present case.

There is some discussion of these two cases in *The Guardians of Nottingham* v. *Tomkinson* (3) before Grove and Lopes JJ. on a case stated by justices in proceedings against a husband for an order on him to maintain a child born of his wife in wedlock, but which he maintained was illegitimate. The proceedings were obviously not proceedings instituted in consequence of adultery, and the Court decided on this ground that evidence by the husband of non-access was inadmissible. The construction of the Act is not considered in the judgments; as it did not apply, the case was clear on the general rule of law to which I have referred repeatedly in the course of this judgment.

The question of the effect of the Act on evidence by husband and wife of non-access to prove illegitimacy is not elucidated by any of these cases except the *Aylesford Case* (4), in which Lord Bramwell gave it as his opinion after consideration that

(1) L. R. 10 Eq. 41.
(2) 5 Ch. D. 545.
(3) 4 C. P. D. 343.
(4) 11 App. Cas. 1.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Viscount Finlay.

it had not the effect for which the respondent contends. It appears to me on the reason of the thing that he was right; the statute does not deal at all with the admissibility of evidence, it deals with the competence of witnesses to give evidence. The common law rule, therefore, remains unshaken.

It was suggested on behalf of the respondent that the rule of evidence as to non-access not being proved by husband or wife does not apply to a suit for dissolution of the marriage. There is no authority for this proposition, and it is contrary to principle. Divorce is legal, but the party who wishes to obtain divorce is not dispensed from observing the rules of evidence. In the present case, the charge of adultery rests solely upon the birth of a child, which is said to be bastardized by the husband's proof of non-access. It falls within the very terms of the rulings of Lord Mansfield and Lord Ellenborough. This evidence is given directly for the purpose of bastardizing the child, and is the only evidence of the adultery.

We have been referred to the practice of the Divorce Court in admitting such evidence in proceedings for divorce. I desire to refer, in this connection, to a passage in the judgment of the Master of the Rolls in the present case (Appendix, p. 640, letters A to B): "I am not going to trouble very much about the practice which we have been told has been in existence of admitting evidence of this kind. I think there are cases which have been cited before the late Lord St. Helier, before the late Lord Hannen, and before other judges of the Divorce Court, which all go to show that, in their opinion, according to the practice of the Divorce Court, such evidence could be given whether upon questions of adultery or sometimes on questions of the custody of children, where the question of the paternity comes in issue. It may be that practice has been wrong, at any rate, it is a practice which does not bind us. In my opinion it was not wrong. I think it proceeded upon the proper ground: the evidence was admissible and relevant, and the exception which did not allow it in legitimacy cases does not extend to cases in the Divorce Court, cases instituted in consequence of adultery.

I have not been able to find the cases referred to by the Master of the Rolls in this passage as containing such expressions of opinion. The cases referred to by the respondent's counsel on this point were the following: *Hetherington* v. *Hetherington* (1), before Sir James Hannen; *Rowell* v. *Rowell* (2), in the Court of Appeal; *Synge* v. *Synge* (3), before Sir Francis Jeune and in the Court of Appeal; *Gordon* v. *Gordon* (4), before Sir Francis Jeune; and *Gaskill* v. *Gaskill* (5), before Lord Birkenhead L.C. In none of these cases can I find any intimation of opinion from the Bench upon the point such as the Master of the Rolls refers to.

Hetherington v. *Hetherington* (1) is reported also in the Law Journal (56 P. and Adm. 78) and in the Law Times Reports (57 L. T. (N. S.) 533). It was a case of an application to Sir J. Hannen to vary an order which had been made by justices under s. 4 of the Matrimonial Causes Act, 1878 (41 Vict. c. 19), that the wife should no longer be bound to cohabit with her husband, who had been convicted of an aggravated assault upon her, and that he should pay her a weekly allowance, which by the Act might cease if she were guilty of adultery. The application was dismissed on the ground that the Court had no jurisdiction to vary such an order except on appeal. Nothing was said by Sir J. Hannen in approval of the practice of the Divorce Court as to the admission of evidence such as that now under consideration. Indeed, it appears from all the three reports of the case that he pointed out with some fullness that the separation order had the effect of a judicial separation, that all presumptions arising from the state of marriage were at an end, and that any child born more than nine months after the separation was presumably illegitimate. *Rowell* v. *Rowell* (2) was a case of covenant for an allowance to the wife and the question was whether on the terms of the separation deed it had ceased owing to a renewal of intercourse

(1) 12 P. D. 112.
(2) [1900] 1 Q. B. 9.
(3) [1900] P. 180; [1901] P. 317.
(4) [1903] P. 141.
(5) (1921) 37 Times L. R. 977; [1921] P. 425.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Viscount Finlay.

between the husband and wife, while *Synge* v. *Synge* (1) was a case of refusal of marital intercourse by the wife, and neither of them throws any light on the present case. *Gordon* v. *Gordon* (2) merely illustrates the proposition that the husband is the father unless intercourse is disproved, and *Gaskill* v. *Gaskill* (3) (as to the period of gestation) contains nothing relevant to this appeal.

It appears that in the Divorce Court a practice has grown up of admitting such evidence by husband and wife, to the extent of allowing proof by them as to absence at the material time. The question now arises whether this practice is right. I have given my reasons for thinking that it is erroneous and that the rule excluding such evidence is not confined to "legitimacy cases," as the Master of the Rolls thought, whatever that expression may denote, and that its application extends to all evidence of non-access. The practice must be based on a certain construction of the Act of 1869. If it appears that the Act does not bear that construction the foundation for the practice is gone and the whole superstructure collapses. The fact that such a view is favoured by the practice of the Divorce Court cannot affect the meaning of the statute. The admission of such evidence must in many cases shorten cases and save expense. There is great pressure of business in the Divorce Court, a great many of the cases are undefended, and, in the cases in which a defence has been entered, very commonly both parties are equally anxious to get a divorce. The point has never really been seriously considered and adjudicated upon.

We have been referred to the practice of admitting the evidence of the husband and wife in nullity suits, and in suits for cruelty as between husband and wife. Such suits have no relevance to the present question. In them there is no question of paternity, or of bastardizing issue. It is immaterial with what object such evidence is given, but, unless there is a child, and the evidence is to show that that child is not the child of the husband, the rule never comes into

(1) [1900] P. 180; [1901] P. 317. (2) [1903] P. 141.
(3) (1921) 37 Times L. R. 977; [1921] P. 425.

play at all. In condonation cases the question of bastardizing issue will, in the nature of things, very rarely, if ever, emerge. If it should, in the course of the consideration of such a defence, become necessary to ascertain the paternity of a child, non-access could no more be proved by the husband or wife than it could in other proceedings.

It is admitted that evidence of non-access by husband or wife is inadmissible in peerage cases, in legitimacy cases, and in actions of ejectment for land. To what an extraordinary state would the admission of this evidence in the present case reduce the law of England! The infant may be illegitimate for the purpose of proving adultery; but legitimate for the purpose of succeeding to property or a title!

It was sought to palliate the proposed creation of such anomalies by referring to the case which sometimes occurs in the Divorce Court of a finding that A. committed adultery with B., while B. is acquitted. It sometimes happens that there are admissions by the respondent of adultery with the co-respondent or vice versa. In such cases there may be a finding against the one but not against the other. Such a case, depending as it does on the absence of evidence against one of the parties, has no analogy with that now under discussion.

It is clear that such evidence would not be admissible in an action of ejectment or proceedings as to right to a peerage. The Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), provides that application may be made by petition to the Court for divorce and matrimonial causes praying the Court for a decree declaring that the petitioner is the legitimate child of his parents and that the Court may hear and determine the application and may make such decree declaratory of the legitimacy or illegitimacy as to the Court may seem just, and such decree shall be binding on all persons, with an exception for the case of persons who have not been cited or made parties and for any case in which it is proved that the decree was obtained by fraud or collusion, It cannot be disputed, and indeed was admitted, that on such a petition

H. L. (E.) 1924 RUSSELL v. RUSSELL. Viscount Finlay.

the evidence of the husband would not be admissible to prove non-access. The result might be that on the petition there would be a declaration in favour of the legitimacy of the child. If your Lordships should come to the conclusion that the evidence by the husband of non-access was admissible in these divorce proceedings, and if such evidence be not admitted, as seems inevitable, on any such legitimacy petition, there might be a grotesque conflict in the results of the two proceedings, the child illegitimate in the one, legitimate in the other. The respondent attempted to meet this by saying that such paradoxes are not unknown to the law of England; I am not aware of any so startling, and if there were it would be no reason for creating another. Your Lordships are now asked to introduce by decision a difference in the substance of the law of evidence according to the tribunal before which the question may arise with the possibility of results whimsical in themselves and discreditable to the law.

In my opinion the evidence should not have been admitted.

LORD DUNEDIN. My Lords, in this case the appellant has been found guilty of adultery with a man unknown. In the course of the case no fewer than three co-respondents have been successively arraigned, and in each case they have been discharged in virtue of a verdict in their favour. There being no evidence such as a confession, which may be evidence against the maker of it but not against others, these verdicts are equally in favour of the appellant.

The finding that the appellant has been guilty of adultery rests upon three propositions: (1.) That she has had a child; (2.) that a child cannot be conceived and born to a woman without previous intercourse with a man; and (3.) that the appellant, during the period within which, according to nature, the child that was born must have been conceived, had no such intercourse with her husband the respondent.

As to the two first of the propositions there is no controversy —the third is denied by the appellant.

I have designedly used the somewhat unprecise word "intercourse" because the facts in this case, as set forth in

the summing-up of the learned judge, are very peculiar, and I should think unique. The appellant conceived and had a child without penetration having ever been effected by any man; she was fecundated ab extra; she had denied intercourse of any sort with any man not her husband; she had admitted that her husband had never effected penetration, but she had said, and he had admitted, that he had been in use to lie between her legs with the male organ in more or less proximity to the orifice of the vagina, and to proceed to emission; but he asserted that, in his opinion, all he had done could not have caused conception, and he specially denied that there had been these practices during the relevant period, though he admitted that he was in bed with her on at least two nights during the same. The jury, this evidence being admitted, after a charge by the learned judge which I consider was scrupulously fair, chose (as they were entitled to do) to prefer the evidence of the husband to that of the wife, and therefore came to the conclusion that she had been fecundated ab extra by another man unknown, and fecundation ab extra is, I doubt not, adultery.

It is obvious that the particular verdict depends upon the admissibility of the husband's evidence. Your Lordships have already decided that the question of whether the verdict can be supported is not open to us, the point having been abandoned by the appellant's counsel in the Court below. The only matter, therefore, that remains (a question at once novel and of immense importance) is whether the evidence of the husband was admissible as to non-access to his wife. I say the evidence of the husband, because, although the wife was examined as to the same subject, that was only done because the evidence of the husband had been admitted, and if the evidence of the husband was inadmissible her evidence also must be disregarded. This would not hurt her case, because it is evident that the onus of the affirmative in what I have called the third proposition is on the respondent, and that, without his own evidence, he must as to this particular verdict undoubtedly fail.

My Lords, I am sorry to have to go into details which may

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Dunedin.

shock listeners, and I regret whole-heartedly that, according to a recent decision of this House, cases such as the present may not be tried in camera; but, as it stands, if justice to my thinking is to be done one must mention these things.

Fecundation ab extra is admittedly, by the medical testimony, as vouched by the learned judge in his summing-up, a rare, but not impossible, occurrence; but its accomplishment will depend, not only or exclusively on the proximity of the organs, but on certain other potential qualities of the particular man. A comparison in this matter between the unknown man and the husband is obviously an impossibility. The crucial evidence therefore comes to be this, the testimony of the husband, that on particular nights he did not indulge in what had been a usual practice.

I may here leave the particular facts, and put the question as general: Is a husband to be allowed to go into the witness box and say, "Though I am not impotent, though I had connection with my wife on other occasions, though I was in bed with her on certain nights, yet I say on those nights I did not have connection, and if, accordingly, her conception must be referable to that period she has been guilty of adultery?"

My Lords, so stated, the proposition, I confess, to my thinking, is outrageous. But I will at once make an admission. I do not think for a moment that the line can be drawn at what happened where there is an admission that the parties had been in bed together. Non-access, although in the relevant sense it means non-access to the wife's person, must include all the forms of non-access which exclude the idea, on the principle that the greater includes the less. Otherwise one would get into an inextricable quagmire. What of separate beds in the same room—of separate rooms with a connecting door, and so on? So that I agree that the proposition must cover, not only the actual non-access, but also facts from which non-access follows as a necessary consequence.

But, while I admit this, I am entitled to say this to those

who hold the other view, that they on their side cannot have it both ways. If they are entitled by the mouth of the husband to prove that he was in another kingdom—a proof in which no sense of propriety or decency is wounded —they must also on their theory face the outrageous feelings which the point, as I have explained it above, excites.

Now the pronouncement on which the appellant principally relies is what Lord Mansfield said in the case of *Goodright* v. *Moss.* (1) In the course of the argument he had said: "The law of England is clear, that the declaration of a father or mother cannot be admitted to bastardize the issue born after the marriage," and in the judgment he said: "It is a rule founded on decency, morality and policy that they" (i.e., the spouses) "shall not be permitted to say after marriage that they had had no connection, and that therefore the offspring is spurious."

Upon this, two questions arise: (1.) Whether the dictum applies to any but proper legitimacy cases; and (2.) whether, if it does apply to cases where the issue is adultery, it was made of no effect by the statute 32 & 33 Vict. c. 68, which provided that the parties to any proceedings instituted in consequence of adultery and the husbands and wives of such parties shall be competent to give evidence in such proceedings. 32 & 33 Vict. represents the year 1869, and therefore up to that time the exact question here could not be determined, because husbands and wives in such proceedings were inadmissible as witnesses. Since that date the point has never in terms been decided, but there is at least one authoritative utterance. In the *Poulett Peerage Case* (2) the question was as to whether the husband could give evidence that he had not had connection with his wife before marriage, and Lord Halsbury, in an opinion concurred in by Lords Macnaghten, Davey, Robertson and Lindley, expressed himself in general terms. The passages are two: "As regards the rule which I think most wisely and properly protects the sanctity of married intercourse and permits it not to be inquired into in any Court of law";

(1) 2 Cowp. 591, 592, 594. (2) [1903] A. C. 395, 399.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Dunedin.

he then goes on to say that it does not apply to a period before marriage, and again he speaks of "the principle wisely ingrafted, as I think, into our law which protects the sanctity of the matrimonial relation."

Sir Douglas Hogg, in the course of as able and concise a speech as I have ever heard at your Lordships' Bar, admitted with perfect frankness that the evidence would be inadmissible in a legitimacy case. I shall hereafter advert to one of the necessary consequences of such an admission, but I hasten to add that I understand that admission as applying to nothing except legitimacy suits in the narrowest sense, by which I mean when the person himself whose legitimacy is in question is a party to the suit, or when the question of yea or nay to legitimacy necessarily settles the point of controversy.

The dictum of Lord Mansfield is not limited in expression. It was pronounced in a case where the actual person whose legitimacy was in question was not any party, but where the answer, yea or nay, to the legitimacy settled the true question in the case. The same may be said of all the poor law cases. The point is whether A. is chargeable to the parish of B. or to the parish of C. If A. is legitimate, then, as his legal father had his settlement in the parish of B., he is chargeable to that parish; if he is not legitimate, then, if either the real father is known and belonged to the parish of C. or if, the father being unknown, the mother belonged to the parish of C., C. is liable. In none of these cases is it denied that the dictum applies, and that the evidence is inadmissible.

Now let me see how the case of adultery stands. Adultery is a fact. In the case we have here to do with there is no direct proof of the fact, but the fact is logically and properly inferred from two other facts—namely, birth (which includes conception which again infers fecundation) and non-access of the husband.

Now the two facts give rise, not to one, but to two logical and proper inferences; they lead, as I have already said, to adultery, but they also lead to illegitimacy of the child

that is born. Is there any real difference, then, between this case and the cases of settlement, as to legitimacy being the true issue? In both cases it is the solution of the underlying question, whether the legal father is the real father that determines the issue. In the one case the result is to declare a certain status, in the other it is to affirm a certain fact. I confess that, so far as I am concerned, I see no real difference between the two cases, so that, according to my thinking, the dictum of Lord Mansfield applies in terms. At the same time I admit at once, as I have said, that up to the present it has not been so applied.

But now let me turn to the ratio of the dictum—that it is contrary to decency, morality and public policy to allow the parents to say that during marriage they had no connection, and that therefore the offspring was spurious. Let me take each of the reasons, though probably morality and decency may be classed as one. I have already pointed out that the proof of non-access varies, according as it invades the privacy of the marriage chamber or only deals with absence, which prevented the spouses meeting. It may be conceded at once that no argument as to morality or decency touches the latter instance. But Lord Mansfield was dealing with all the possibilities, and it is, I think, equally clear that evidence as to what happens when married persons are in bed together does offend against decency, which, in the time of Lord Mansfield, would have been generally considered as synonymous with morality. And here I must most respectfully protest against the sense attributed by the learned judges of the Court of Appeal in this case to the term "decency." The late Master of the Rolls, whose judgments I have always considered with the greatest respect, did, I cannot help saying, to my thinking, entirely misinterpret the word "decency" as used by Lord Mansfield. Again and again he insists on the fact that in many other cases judges are forced to consider details of the most unsavoury character, and that there can be no reason to suppose that, if they are subjected to that unpleasantness, they would shrink from what they might have to meet in

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Dunedin.

respect of the evidence in question. My Lords, decency, as Lord Mansfield used the term, I venture to think had nothing in the world to do with the feelings of judges. Judges are bound to do their duty. How far they may become case-hardened to all they are called on to hear will depend on individual attributes. But, whether it pains them or not, I am sure they will do their duty. The decency that Lord Mansfield referred to was the decency before all the world of laying bare the most secret, and, at the same time, the most sacred, of the legitimate relations of man and woman as husband and wife. I do not think I need emphasize the natural repugnance which such a proposal excites. Let me rather point out for a moment the consequences of allowing such evidence. I agree that in so doing, though not leaving the question of decency, I necessarily also enter the domain of public policy. Let me first remind your Lordships that the sole question is as to proving adultery by reason of the two concomitant facts, the birth of a child and non-access by the husband. It is common knowledge that the use of various means to effectuate birth-control is not unknown, and is practised by some, be they many or few. Are we to have a husband going into the box to say: "This child was not mine, because I took the precautions which are effectual," and then to have the jury consider the question as to whether this statement satisfies them? Or again, is there to be the necessity that the jury are to be satisfied as to the reliability of the man's memory as to whether he, on a stated occasion, did not exercise marital functions? And here I must say I am not moved by the observation made by the learned judges of the Court of Appeal, when it was pointed out that this opened the door to a married man to asseverate adultery on the part of his wife when she had had a child, that juries might be trusted.

Juries are not always right in their determinations; they are sometimes swayed by considerations really irrelevant to the issue before them, and the verdict of a jury cannot be set aside merely because it is wrong. If this evidence is rightly admitted it puts a weapon in the hands of a husband

tired of his wife and anxious for a new start (for be it remembered this method of proving adultery is unavailable to the wife) the efficiency of which comes to depend upon the view of a jury upon a fact which hitherto has been thought to be one which ought never to be considered, except by the parties themselves, and it subjects the juries, where there is assertion and denial, to what I think is really an impossible task—namely, to find out which spouse is speaking the truth on a subject where no corroboration of either is possible.

But the question of public policy does not rest alone on the considerations where it is associated with decency. I have already mentioned the admission of the learned counsel for the respondent that the evidence is inadmissible in a true case of legitimacy; therefore, said he, if the child in the present case grows up, and survives the respondent and the respondent's father, he will be able, nemine contradicente, to take his seat in this House. But the child need not wait till then; he may take proceedings under the Declaration of Legitimacy Act and have his legitimacy proclaimed at once. What a situation ensues! This verdict standing, judgment is only reached by the admission of the fact that the seemingly legal father of the child was not his real father, and, if that is not a declaration of bastardy, what is? Yet at the same time, or at no long interval, the same Court may be called on to declare that the child is legitimate. Is that a position consistent with public policy?

The learned counsel seemed to think that it was a good answer to point out that in a case where adultery is charged the wife may be found guilty, and the co-respondent with whom the adultery is committed is set free. But the case is not the same. Two persons are there in question; the one, against whom a confession made by herself is used, pays the penalty; the other, against whom there is no admissible evidence, is not found liable in damages; there is no question of status as to him. But here the same person, and that one who is powerless to defend himself, is the subject of two positively contradictory findings. I am therefore of opinion that the words of Lord Mansfield are directly applicable

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Dunedin.

to this case, and that it is against the interests of decency and public policy that the spouses should be allowed to give evidence of non-access, and thus de facto, even if not de jure, to bastardize their issue, when conception and birth alike fell within the time of wedlock.

As to the form of non-access, or, more accurately, the class of evidence, such as absence, from which non-access to the person can be inferred, this can, I should say, in every case be proved by evidence aliunde.

If, then, the dictum applies, was it altered by the passing of the Act which made the spouses competent witnesses in proceedings arising out of adultery? My Lords, I cannot conceive how this can be. The competency of a witness, as a witness, is a perfectly different thing from what can be accepted as testimony. In Lord Mansfield's time there was no question as to the competency of the spouses as witnesses; he specially draws the distinction. He says they are not only competent, but the best witnesses as to the date of birth. In all the poor law cases, after the disability interest was abolished, the spouses were competent witnesses. I confess, therefore, that if once the rule is established, I see nothing in the admission of the spouses to be competent witnesses to alter the rule. I have had the advantage of reading the opinion delivered by Lord Finlay and I therefore do not repeat what he has said about Lord Bramwell's opinion in the *Aylesford Case*: nor have I thought it necessary to quote the various cases which affirmed Lord Mansfield's dictum in terms.

But then it is said that the testimony of the spouses has been admitted in many other cases—in nullity, condonation, cruelty, and, lastly, in adultery, in the Divorce Court of recent years.

Now as regards nullity, cruelty and condonation I do not feel the slightest difficulty; the whole point of Lord Mansfield's dictum rests on the concluding words: "and to make the issue spurious," in other words, it is when conjugal conduct is used, not as a thing in itself, but as leading to other inferences that the harm comes in. No proof of conduct or want of conduct which shows nullity, no proof of cruelty,

such as communicating venereal disease, no proof of connection such as in itself is condonation, has the remotest reference to the point of legitimacy of issue. The evidences of the spouses in these cases is the only evidence available to the direct fact in issue, and has in the giving of it no evil consequences.

Then, as to the practice of the Divorce Court, Sir Douglas Hogg has probably practised but little in that Court, but he had with him others who had, and I did not understand him to say that he could cite any instance of the class of testimony in evidence in this case which has ever been given. I can well imagine that, especially after the war, it was found convenient in undefended cases to allow the husband to say: "I left England on such and such a day; I did not return until such a day, and then I either found my wife had had a child or she had subsequently had a child, when conception must have been at the date when I was abroad." There was no one to object, and it saved time and trouble. But the facts could equally well have been proved by other witnesses in the regiment to which he belonged. The practice has never been sanctioned by decision, it is not binding on your Lordships, and I see no real encroachment on justice which its surrender would entail. I am, therefore, not affected by the fear that a judgment in the sense in which I think it ought to be pronounced would in any way upset the practice of the Divorce Court, or make the discovery of the truth more difficult. A judgment the other way would, in my opinion, open the door to gross abuse, put upon juries an almost impossible task, do the very cruellest of wrongs to persons who cannot lift a hand to protect themselves, and introduce into the law an uncertainty based on inquiring into the details of life which ought to be sacred between the persons concerned. I am, therefore, unhesitatingly of opinion that the evidence ought not to have been admitted, and that the verdict cannot stand. To hold otherwise would be to open wide a door through which in the sequel falsehood will enter oftener than truth.

I am bound to make one other observation. It may be

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Dunedin.

said that such harm as can be done to the child is already done. His legitimacy in law is secure, his legitimacy in the eyes of the world has perished with the verdict. It is indeed a misfortune for him, if my view is right, that the evidence was ever admitted, even if we find it was wrongly admitted. But, after all, the verdict of the jury is not necessarily right. I do not consider myself at liberty, in the circumstances already mentioned, to examine the evidence, and, having done so, to express a conclusion of my own; but I may say it is trite law that judges, who cannot interfere with the verdict of a jury, because they cannot say that there was no evidence on which such a verdict might be given, yet can and often do think the verdict of the jury was wrong. If this evidence was wrongly admitted, the verdict goes, and whether the verdict, even on the evidence, was right or not can never be a concluded question.

LORD SUMNER. My Lords, the only question, upon which I shall trouble your Lordships, is the admissibility of the petitioner's evidence to the effect that at no material times were his relations with his wife such as could have resulted in the birth of the child, of which she was delivered. If that was rightly admitted, the evidence before the jury was such that, after the unexceptionable direction of Hill J., the verdict cannot be disturbed.

It is, of course, impossible not to be very fully alive to the fact that this case excites and will continue to excite warm feelings of sympathy, commiseration and chivalry. Some will be on the side of the husband, more of the wife, most of the child. I recognize that such sensibilities are respectable and deep, but they do not concern the law. The questions raised in this appeal come before your Lordships on a basis of fact, which is settled by the verdict of the jury, and as, in my view, they are pure questions of law, difficult but dry, on which it is impossible to dogmatise and useless to be perturbed, I am constrained, to my regret, to submit to your Lordships a longer examination of the law than I should have wished, or perhaps than is proper in a mere dissentient opinion.

The appellant relies on a rule, which forbids spouses, sub modo or in the alternative unconditionally, to give any evidence, which tends to show that at some material time marital relations did not take place between them, at least until the age for such relations is passed. The first question must be in what words should this rule be laid down? Lord Mansfield's words in *Goodright's Case* (1) and Lord Halsbury's in the *Poulett Peerage Case* (2) have been chiefly relied on. I need not quote them again. In terms, the latter are wider than the former. They differ, further, in other respects, but I understood the appellant to contend in the first instance for Lord Halsbury's version literatim. This cannot be right. To say that the law does not permit married intercourse to be inquired into in any Court of law is in conflict with the clear rule, that it can be and always is inquired into in nullity cases, in condonation cases whether there is a child or not, and in cases where cruelty by the communication of a venereal disease is alleged. I do not suppose Lord Halsbury intended to give the rule a wider ambit than Lord Mansfield's; that is to say, I think that it is a common feature of both statements, expressed in the one case and implied in the other, that, whatever be the policy of the rule, such evidence cannot be admitted to bastardize issue born after marriage. In both cases legitimacy was directly before the Court; in *Goodright's Case* (1) that of the plaintiff's lessor, in the *Poulett Case* (2) that of the claimant to the peerage. In both, as it happens, the enunciation of the rule was, strictly speaking, unnecessary to the decision. In both it was extempore. The rule was stated only for the purpose of saying that it did not apply. Hence no doubt less precision was needed in formulating it than might otherwise have been the case, and it became unnecessary for the opinions subsequently delivered to criticize or to restate it. Lord Halsbury's statement was made in an interlocutory decision upon an objection taken to evidence in the course of the hearing, and, as the Minutes of Evidence before the Committee for Privileges show, the

(1) 2 Cowp. 591. (2) [1903] A. C. 395.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Sumner.

authorities, which have been before your Lordships, had not been discussed. The *Anonymous Case* reported in 22 Beav. 481 and 23 Beav. 273 alone had been referred to at length, and no doubt Lord Halsbury thought, and rightly thought, that the nature of the case before the Committee sufficiently safeguarded his language from misconception. The appellant, however, contends that the prohibition is not limited to cases where offspring would be "bastardized" by the evidence, whatever the meaning of that word may be, but that it applies generally for the protection of the sanctity of marriage.

Rex v. *Sourton* (1) is another case much relied on as containing statements of the rule in an unlimited form, e.g., that of Williams J., "non access is a fact not to be proved by the husband or wife." The headnote itself is stupid, for it purports to lay down a universal proposition: "Neither husband nor wife can be examined for the purpose of proving non-access during marriage," which went beyond the decision. Not only, however, was this a pauper settlement case, one of a class in which the rule undoubtedly applies, but Lord Denman, giving the first judgment, expressly quoted it from Starkie on Evidence, 2nd ed. Now Starkie, in his original work (1824), as well as in the edition quoted, of 1833, followed the plan of the older Abridgments and Digests, and arranged this part of his book under headings such as Bastardy and Pedigree. Lord Denman, citing and approving this work, of course knew, as did his colleagues, that the statement quoted occurred under the latter heading and was not of general application, but, as the case in hand was a case of derivative pauper settlement, he had no need to draw the distinction. Without bearing these facts in mind, the judgments in *Rex* v. *Sourton* are apt to be cited as laying down a wider proposition than was intended: for example by Lopes J. in *Nottingham Guardians* v. *Tomkinson*. (2)

Lord Mansfield's version of the rule, as the decisions have gone hitherto, is applicable (1.) in peerage cases; (2.) in issues directed by the Court of Chancery to try questions

(1) 5 Ad. & E. 180, 190. (2) 4 C. P. D. 343, 350.

of legitimacy; (3.) in cases where a claim is made to a fund or an estate by or on behalf of persons, on whose legitimacy the right to claim depends; (4.) in ejectments brought to try a title to land, which depends on the legitimacy of a party or his lessor, in whose right he claims; (5.) in cases of derivative pauper settlements, of affiliation cases, and of claims by poor law authorities against persons, who fail to maintain children, whether legitimate or bastard, for whose support they are liable. The common feature of all these cases is, of course, that the legitimacy of a person, whose status, rights and treatment are before the Court is directly in issue and is to be determined, with consequent effect upon his legal rights and fortunes. Beyond such cases Lord Mansfield's rule has never yet been applied in the century and a half since it was formulated.

Although the contrary was argued, I do not think that this last class can be treated as one, in which the rights of the person, whose legitimacy is in question, are not directly affected. Accordingly it cannot be urged as authority for applying the rule to divorce cases now. It is true that of all five classes this alone has any appearance of carrying the rule beyond cases, in which the legitimacy of the supposed bastard is directly in issue, but it is an appearance only. No doubt in pauper settlement cases the complainants before the justices are the overseers or guardians on whose area the pauper is actually chargeable though he has not acquired any legal settlement there, and the respondents represent the area of his last legal settlement, to which he is to be removed, but the order made is an order that binds him and is one on which he can be heard. It is not true that the issue is, which parish shall pay for keeping him, nor is the guardians' claim a claim in debt. The issue is whether the pauper shall be bodily transferred, and, if the complaint succeeds, the order is that this shall be done. If confirmed by an order of quarter sessions, the decision is binding as a judgment in rem, concluding the status of the pauper as settled in a particular place, and binds not merely the two parishes concerned but all other parishes and all the world,

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Sumner.

the pauper himself included: *Rex* v. *Wick St. Lawrence* (1); *Reg.* v. *Wye* (2), and it was for this reason and for his protection that, following the general rule in proceedings in rem, the pauper himself could appeal to quarter sessions against the justices' order: per Bayley J., *Rex* v. *Catterall.* (3) It is true that, being ex hypothesi without means and often an infant, he may rarely have exercised this right, but the principle remains. Such was the law when the settlement cases were decided, which are material authorities on the present appeal, and I do not think that changes introduced by subsequent poor law legislation affect these considerations. It was not suggested that the affiliation cases or the others carry the matter any further. In all of them the legitimacy or illegitimacy of the child to be maintained fixes the liability to maintain it and is the issue in the case.

The rule excluding this evidence has been applied in the Divorce Court, but only when the interests of children have been directly in question and the proceedings for divorce had been concluded. Taken in conjunction with the entire absence of any decision excluding it in proceedings instituted in consequence of adultery, this is strong to show that Lord Mansfield's rule at any rate has always been held not to extend beyond cases, in which the rights and interests of the supposed bastard are being directly dealt with. In *Gordon* v. *Gordon* (4), after the decree for dissolution of the marriage had been made absolute and the respondent and co-respondent had married, a question arose as to the custody of the respondent's child. She was asked, "Who is the father of the child?"; and, on objection taken (by Mr. Duke K.C.), Sir Francis Jeune disallowed the question, saying "if the child was proved not to be the issue of the marriage I should have no jurisdiction over it" and, failing sufficient proof to bastardize the child, he made an order for its custody. Here it was the child and the arrangements for its welfare that were in issue, and not any proceeding in consequence of adultery, since that had been disposed of, and Sir Francis

(1) (1833) 5 B. & Ad. 526, 535.
(2) 7 Ad. & E. 761, 769.
(3) (1817) 6 M. & S. 83, 85.
(4) Times Newspaper, Feb. 16, 1903.

Jeune exercised his jurisdiction to protect the rights and interests of the child, not his jurisdiction to inquire into an issue of adultery for the purpose of dissolving the marriage. The decision in *Pryor* v. *Pryor* (1) with regard to varying settlements after the decree points in the same direction.

It is argued that this absence of authority is of small significance. Before 1869 spouses could not give evidence at all in divorce cases, and it is suggested that since then the question does not appear to have been debated. Husbands, however, could give evidence for several years before 1869 in actions for goods supplied on a wife's credit, and the objection to pay, on the ground that the goods were required for a child of the wife's, not begotten by the husband, can hardly have been unknown, though no case, so far as I know, is reported upon the point. The fact that before 1869 spouses could not testify in divorce proceedings at all adds another difficulty with regard to the statement made by Lord Mansfield in *Goodright's Case.* (2) He referred, apparently as authority for his proposition, to a recent decision of the Delegates, of which no note seems to have been found. If that decision was in an appeal where the rights of an infant were directly in issue and were to be dealt with by the Delegates, it is of no assistance for the purpose, for which Lord Mansfield's judgment is now cited. On the other hand, I fail to see how the point could have arisen before them in such a question as is now before your Lordships. If under any circumstances the Delegates could have had before them evidence of the spouses, already taken in the matrimonial causes with which they dealt on appeal, s. 3 of the Act of 1869 was not required, since the necessary jurisdiction was in that case already vested in the Divorce Court by the Act of 1857. If they could not, how did this question arise before them for decision ?

For fifty years it seems to have been the view of the judges who have sat and of the members of the legal profession who have practised in divorce cases that by its nature the rule in *Goodright's Case* (2) is not a rule of Divorce law.

(1) (1887) 12 P. D. 165. (2) 2 Cowp. 591.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Sumner.

The point is not that the books contain little, if anything, to the contrary of the application of the rule, but that there is nothing to show that it has been held to apply at all. The question cannot have been entirely absent in litigation until the last three or four years, and we know that in that period at any rate many decrees have been granted after and in consequence of the admission of a husband's evidence, which, if applicable, this rule would have excluded. It is no answer to say that a husband's evidence of non-access has only been admitted to save expense and time. That is not the way in which matrimonial jurisdiction is or ought to be exercised. Decrees of dissolution of marriage are to be made only upon strict proof. Consent to a decree, direct or indirect, is inadmissible, nor is there any one present to make admissions, if the suit is undefended. In such cases the judge must, and I doubt not does, watch vigilantly to see that the evidence on which he acts is such only as he is entitled to receive, and the rule in *Goodright's Case* (1), if it applies at all, is a striking one which could hardly be overlooked. The fact that both parties are equally anxious to get a divorce is precisely a reason why the judge should be absolutely strict as to proof. No consideration of saving time and trouble can be a legitimate ground for admitting illegitimate evidence. Once only does the matter appear to have been referred to. Horridge J., whose wide experience in such cases is well known, raised a doubt in a defended case, *Bowden* v. *Bowden* (2), but nevertheless admitted the evidence. Neither the grounds for the doubt nor the grounds for the decision are reported. In *Gaskill* v. *Gaskill* (3), where the admission of the husband's evidence, tending to prove non-access, was not questioned at the hearing, I cannot but think that the Attorney-General would have challenged it on the further inquiry, if it had been of even doubtful admissibility, for the objection, if well founded, was fatal to the whole suit and its issue need not then have been hazarded on a nice and difficult matter of medical evidence. This is all the more

(1) 2 Cowp. 591. (2) (1917) 62 Sol. J. 105.
(3) [1921] P. 425, 433.

noticeable because the rule about the weight of the evidence required to rebut the presumption of coition (a matter removed from consideration in this case by the verdict), which was dealt with in *Morris* v. *Davies* (1), was discussed and considered by Lord Birkenhead and his quotation of Lord Lyndhurst's opinion is followed by the words: "I need only mention that Lord Lyndhurst referred to a sentence of divorce pronounced in accordance with the law as it then existed, and the rule he stated must be modified to accord with the present state of the law; but no point arises here on that aspect of his judgment. It is true that the observations were made in reference to a legitimacy suit, but I cannot conceive that in the present case any different principle can apply; otherwise it might happen that the mother would be condemned for adultery on evidence, which would not disentitle the child to be declared to be the legitimate issue of her husband." An argument which gave rise to such observations could hardly have stopped short without drawing attention to *Goodright's Case* (2) and *Rex* v. *Sourton* (3), except upon the assumption that, in the opinion of the profession, such a rule had no application to the suit.

It should be borne in mind that the reasons, which Lord Mansfield gave for his version of the rule, differed from those found in the decided cases on which, according to the report in Cowper, he purported to base himself. Further, it was many years before his version was fully accepted in other cases. So far as the rule and its reasons can be collected from *Rex* v. *Willey* (4), and *Rex* v. *St. Peter's, Worcester* (5), and *Rex* v. *Stockland* (6), from *Rex* v. *Reading* (7), and *Rex* v. *Rook* (8), the reason for closing the mother's mouth was supposed to be that her evidence of non-access tended to relieve her husband from liability to support the child, and so was interested evidence; though, apparently,

(1) 5 Cl. & F. 163, 215.
(2) 2 Cowp. 591.
(3) 5 Ad. & E. 180.
(4) (1734) Referred to in Burr. Settlemt. Cas. at p. 27.
(5) Burr. Settlemt. Cas. 25.
(6) Burr. Settlemt. Cas. 508.
(7) Cas. temp. Hard. 79.
(8) 1 Wils. 340.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Sumner.

if no other evidence of it could be got, her evidence might be admitted on the ground of necessity: *Rex* v. *Bedall.* (1) Francis Buller (afterwards Buller J.) published his *Nisi Prius Cases*, which were founded on notes made by Lord Apsley L.C., when he was Bathurst J. In 1772, only five years before *Goodright* v. *Moss* (2), not only does he seem to be a stranger to the rule in Lord Mansfield's form, but he cites *Rex* v. *St. Peter's* (3) and *Rex* v. *Reading* (4) as unqualified authorities, and so they remained in subsequent editions down to 1817. A comparison of *Rex* v. *Luffe* (5) with *Rex* v. *Kea* (6) shows how long it was before the consideration of the child's interest in not being bastardized superseded finally the consideration of the husband's interest in not having to keep the child as the ground on which the rule was thought to be justified. Down to 1856 (*Legge* v. *Edmonds* (7)) we find it to have been the opinion of so eminent a person as Wood V.-C. that Lord Mansfield's statement of the law in *Goodright* v. *Moss* (2) was new, and I venture to think, considering what grounds there are for taking this view, that one ought not to attach very great weight to so general a statement of the reasons for a rule, which Lord Mansfield only mentioned for the purpose of saying that it did not apply in the case before him.

My Lords, notwithstanding that the rule, as Lord Mansfield states it, has never been applied in proceedings instituted in consequence of adultery and that, as I believe, the whole inclination of opinion of the Bench and the legal profession has been against such an application, it is no doubt competent to your Lordships to declare the law, even after all these years, in the sense for which the appellant contends. Accordingly, two questions next arise, firstly, what is the meaning of the reference to bastardizing issue, which Lord Mansfield made? and secondly, what is the basis and the object of the rule itself?

It will be observed that there is a difference between the

(1) (1737) 2 Str. 1076.
(2) 2 Cowp. 591.
(3) Burr. Settlemt. Cas. 25.
(4) Cas. temp. Hard. 79.
(5) 8 East, 193.
(6) 11 East, 132.
(7) (1855) 25 L. J. (Ch.) 125.

effect of the words "founded on decency, morality and public policy" and that of the words "to bastardize the issue born after marriage." The latter are an integral part of the rule itself; they limit its content. The former merely give the reason for having such a rule; they are, as it were, simply the expression of the motive of the legislator. The reference to bastardizing the issue is therefore much the more important.

Against those who say that by "bastardizing the issue" Lord Mansfield merely denotes evidence to show that the child is illegitimate, I am afraid that, beyond indicating with humility that I do not believe it, I can only add that the evidence admitted did in fact show that the child was a bastard, though not an adulterine bastard, and that bastardize is a term of art and presumably was so used. If it is to be held, that in the present proceedings this evidence was really admitted to bastardize the issue, it is hard to say in what proceedings such evidence would not be rejected. I will venture to put two cases. (1.) A married woman bears a child, congenitally afflicted with a venereal disease, and then it is stated of her husband that he is responsible. To clear his character he brings an action of slander, and, to meet a plea of justification and proof that he was in fact infected with this disease, he desires to say, as the fact is, that though he lived in the same house as his wife, yet, knowing himself to be infected, he was scrupulous to keep away from her at all times material to the child's conception. If this evidence is admitted and believed his character is at least cleared from the worst imputation. If it is not admitted, his case is gone. Does this evidence bastardize the issue any more than the present respondent's did? On the other hand, does any one say that in such a case the plaintiff's mouth would be closed? (2.) Again, a man is indicted for incest with a young woman alleged to be his daughter. His one defence is that, though born of his wife during their marriage and brought up as his child to avoid scandal, he had not begotten her; she was a bastard of his wife's. If he can give this evidence, he has a defence to go to the jury; if, on the other hand, the

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Sumner.

rule applies, then, in a case where no evidence of non-access but his own is available, he will go to prison. These results follow, notwithstanding that, in the first case, by 14 & 15 Vict. c. 99, ss. 1, 2, the plaintiff was a competent and compellable witness and in the second the prisoner was a competent witness by 61 & 62 Vict. c. 36, excepting as to the giving of evidence of communications between himself and his wife.

I suppose it will be recognized that, as the objection to the admissibility of evidence has to be taken before the evidence is given, it is to be decided on the assumption that, if given, it will be material and may be believed. If so, it will not affect the value of my illustrations as tests to say, as doubtless it is very natural to say, that such men would not get any one to believe them and that in any case it serves them right. The question is whether the evidence tendered can be shut out. On the other hand, on this assumption exclusion of this evidence means that an injured husband's mouth is closed and his story goes untold for the benefit of an unfaithful wife, simply for fear of prejudicing a child, which is not his in fact, however the law may insist on regarding it.

It is convenient to consider further how far the rule would go if applied in ordinary divorce cases, not, of course, for the purpose of deciding questions before they arise but of testing the grounds for applying the rule at all. The fact to be proved, on which the husband's right to a divorce is based, is simply the wife's adultery. Whether her adultery resulted in the birth of a child or not is immaterial to that right. The birth of the child is not one of the facta probanda but it may be one of the facta probativa. For this purpose the birth of a still-born child or a miscarriage or mere pregnancy would, if sufficiently referable to the critical time, be equally probative. On the other hand, if the child died before the hearing or were a hopeless imbecile from birth, how could bastardizing him cause any prejudice? In this connection, therefore, the existence of a living child is but an incident, if not a mere accident. In the catena of proof of the adultery

alleged his birth and existence may range from being practically conclusive to being of no importance until dates can be fixed, which the rest of the evidence leaves in doubt. If, both spouses being white themselves and of indubitably white ancestry on both sides, the wife bears a mulatto child of marked negro paternity, I do not see what need there is of further testimony about access, and I suppose (at least I hope) that common sense would prevail over presumption. At the other end of the scale, until the petitioner can fix his own absence or abstinence between dates that preclude the possibility of his having begotten the child that has been born, the birth of the child is in itself of little or no significance. So untrue is it to say that, in proceedings instituted in consequence of adultery, the legitimacy of the child can be the real issue before the Court. Now it is not disputed that in the present case neither the petitioner's evidence nor the jury's verdict nor the Court's decree affects the rights of the child as presumably legitimate, or can be used against him to deprive him of those rights. How then can it be said that the evidence objected to was given to bastardize, or did bastardize, the child ?

My Lords, I refrain from putting further specific illustrations on this point. It is everyday experience that for practical purposes people's reputations are often at stake in proceedings, to which they are not parties and where they have no protection beyond that of delivering a watching brief. They must suffer in silence. A witness is called, on whose credibility the whole case depends, and the jury disregard his story. Till the case is forgotten everybody will say of him, that he told lies in the witness-box ; many will say that the jury convicted him of perjury. In a legal sense they did not; in a popular sense they did. So in a legal sense the appellant's child is not bastardized in the present proceedings but only in a popular one. Again, the witness can indeed bring an action to clear his character against those who make such statements about him ; but the child can hold and succeed to all his rights as the legitimate offspring of the respondent till some one takes proceedings to

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Sumner.

impugn them. So far he is the better off of the two. What reason is there for protecting the baby and not the witness? The mute testimony of the one and the spoken testimony of the other are mere media of proof of an issue, by which neither child nor witness is legally bound. For my part I fail to see any substantial distinction.

If the bastardizing of the issue, whether in the legal or in the popular sense, is to be the real point of the rule, there is considerable difficulty both in reconciling Lord Mansfield's statement with Lord Halsbury's and in taking the former as a principle, which will solve all the cases that the tender of such evidence might raise. In the *Poulett Case* there is no doubt that Lord Poulett's evidence was given in advance and was subsequently admitted with the object and effect of bastardizing, in the fullest sense of the term, a claimant, who was prima facie legitimate, being born of Lady Poulett during her marriage to the witness. Why was it admitted? Not because it did not bastardize the offspring, for it did, but because it did not tend to prove that there had not been connection between the spouses during the marriage; for, on the contrary, it proved Lord Poulett's virtue as a bachelor without touching the performance of his marital duties as a married man. Accordingly the sanctity of matrimony was really preserved by the admission of his evidence.

I will put a case, not to invite its decision, for it is perfectly legitimate to say that the case need not be decided till it arises, but because I have used it myself as a test of the principle of this rule and frankly do not see the answer. Those who remember Sir James Stephen's Digest of the Law of Evidence will recall a footnote, in which he explains how promptly in his time in India widows of soldiers, who died, married again so as to remain on the strength of the regiment. Suppose such a case. A soldier, a man of some family connections, through whom any child of his would become some day entitled to property, dies after cohabiting with his wife up to his death. She remarries in two or three weeks, but by consent between the spouses the second marriage is not consummated until,

firstly, it is ascertained whether or not she will conceive by the first husband, and, secondly, when it is found that she is with child, not until after the child is born. Whose is that child? In proceedings to establish his right as the first husband's son, can the second husband and the mother prove the above facts as to non-consummation or can they not? There is no question of bastardizing the child in either case. His interest calls for the admission of the evidence, which makes him the child of a man of property and not the child of a common soldier. On the other hand the sanctity of married intercourse is violated and its secrets are divulged, if the spouses are allowed honestly to describe the course, which they honestly pursued. For my part I cannot solve the problem. I imagine the evidence would be excluded on some ground, but, not knowing what, I feel a difficulty in trying to extend the rule to new cases.

My Lords, neither can I find any guidance in applying the rule in Lord Mansfield's words, "decency, morality and public policy." The last tells us nothing. All our law, even statute law, is supposed to rest on public policy, but as public policy is an evolving not to say an unstable thing, the public policy of one century may not be quite the same as that of the next but one. In a matter like the present the word morality tells us nothing, for what moralists condemn the law ignores. What the petitioner described was outside the law but it was matter of fact. The questions were, would the law admit evidence of that fact and would men of the world believe it? Upon these three subjects, morality, decency and public policy, I will only say this. If it had been feasible for the petitioner to have given evidence of "non-access" by the mouth of some third person, some chambermaid or spy, or, it may be, by the wife's written confession that the child was not his and that nothing had taken place between the spouses that could have made it his, he could have taken his proceedings and called this evidence, and if he failed to obtain his decree it would not have been decency or morality or the bastardizing of the child that would have defeated him but the

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Sumner.

incredulity of the jury. If, on the other hand, the evidence, which his case required, was merely something "tending to prove non-access," as for example absence from home, then a well-to-do man, able to afford the search for and the production of the evidence of third persons to prove it, would get his decree; but a labourer, who had roamed the country in search of work and could only prove his absence from home by his own evidence, would find his mouth closed on a vital point and would remain tied to an unfaithful wife and bound to maintain another's child in the name of a rule founded on public policy.

That the exclusion must extend to any evidence tending to prove "non-access" if there is to be exclusion at all, I quite agree. There are many dicta to this effect, and I think your Lordships have felt throughout the weight of this contention. The indecency is in the denial of those normal connubial relations which are presumed in law, not in the relations which may have been substituted for them, nor in the details of various forms of amorous, but non-generative, behaviour. It cannot be a question of the same bed, the same room, the same house, or the same parish. Non-access, as it is called, is the matter either to be proved or to be excluded, and the exclusion of the spouses' evidence must extend to all items of proof without regard to their relative magnitude, since each one may be essential to the conclusion. One has only to imagine how possible it might be with time, money, and skilled advice to build up a sufficient case of non-access without calling the husband, who procures, pays for and profits by the result, and how impossible such a course would be to a man who has no time, no money and no advisers, but merely knows the truth himself better than any one else can know it, to see the inequality of the working of this rule of exclusion, if extended to divorce cases.

It is to be remembered that only a few years ago a husband, who had been forbidden by law to prove that fact of non-access which, if proved, would have completed his case for a divorce, might, if he refused further to cohabit

with a wife, whom he knew to have been unfaithful, have been subjected at her instance to an order for the restitution of her connubial rights, and in case of disobedience, have been imprisoned for his contumacy. If, on the other hand, on this principle he catches her in further matrimonial offences, and this time secures his decree, he can, on the question of the custody of the child, close her mouth as to its paternity and keep from her the child, whom he and she both know to be her paramour's. As for the child, he must console himself for a bleak and unkindly childhood by reflecting, when of age, how scrupulously the law has safeguarded his status of legitimacy.

In using the word decency I agree that Lord Mansfield did not exclusively refer to what is in itself unseemly or disgusting. He probably thought more of things, which a husband should be ashamed to say, than of things that a judge must blush to hear, but what does that prove? Decency would not surely prevent a husband from saying that during such and such a year he was continuously in India, and yet, decent or not, that is excluded when the rule applies at all, since it tends to prove "non-access." I find no guidance to be derived from this word, and will only say how grave an injustice is done, in my opinion, to the memory of the late Lord Sterndale in thinking that he went strangely wrong in applying Lord Mansfield's word "decency" to the feeling, which bars things contaminating and gross (an error, if it be one, which I share) or in dwelling on the revolting aspect which such evidence might take, so as to lighten the task of judges in divorce cases, and to enable them to shirk duties which they ought to perform. Of such a course he was incapable, nor would it occur to judges of the High Court in England so to interpret his reasoning. I have had the great honour of being counted among their number, and I am convinced that all the heavy responsibilities, which these cases involve, are accepted without demur, and further that they watch the admissibility of the evidence tendered in undefended divorce cases as vigilantly as if they were protecting the interests of a prisoner undefended by counsel.

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Sumner.

The argument must next be examined, which rests on the phrase about protecting the sanctity of married intercourse, which was substituted by Lord Halsbury for Lord Mansfield's phrase about bastardizing the issue. Both are relied on as reasons for extending the rule to the present case. Are they merely alternative ways of stating an identical principle or are they distinct conditions, both of which have to be satisfied? If they are the former, I think that the whole jurisdiction in divorce negatives the application of the rule. Petitions are presented under that jurisdiction for the express purpose of enabling the spouses themselves to publish the facts of their married life and so to obtain a decree dissolving the marriage, the sanctity of which the rule stated in the *Poulett Case* was devised to preserve. If, on the other hand, the preservation of the sanctity of married life and the protection of the legitimacy of the issue born in wedlock are separate and distinct conditions of the applicability of the rule, the question arises whether in the present case both these conditions can be satisfied.

My Lords, I am afraid that the sanctity of married intercourse passed into the limbo of "lost causes and impossible loyalties" in 1857. You cannot give the spouses the legal right to have their married life investigated in open Court, with a view to its formal and legal termination, without being prepared, when necessary, to violate the sanctity of that life. The law recognizes this. The Divorce Court sits that the secrets of married life may be divulged. Its decorum is preserved by those who preside and those who practise in it, and is preserved with extraordinary success; but to exclude a particular class of evidence when it is given by one person and not when it is given by another is a thing that can only prejudice that decorum by making it plain that the Court is being kept in the dark on a material part of the case, while leaving the sanctity of matrimonial intercourse to be the subject of prurient curiosity and malicious gibes as before. Decently or not, the law permits a husband to obtain a decree by his own sole evidence, if he catches the guilty parties in flagranti delicto. How is a rule to be justified, which forbids him to give his own evidence

as to relevant facts that merely tend to the same result? The effect on the sanctities of married life is the same; the effect on the offspring is the same. The evidence, so far as the child is concerned, is equally material socially and legally equally immaterial. The only logical exit from this antinomy is to say that the rule only applies where the child's rights are legally affected. To close the husband's mouth otherwise is not a principle; it is a taboo. To my mind, the only logical and legal solution is to recognize, what is legally true, that a divorce petition and a legitimacy issue are distinct, to apply the rule, which is essentially a legitimacy rule, when, but only when, Courts have been wont to apply it before, and to establish in a Court, which exercises a separate and statutory jurisdiction, the principle that all relevant evidence is admissible unless it is excluded by Act of Parliament.

It is, however, said that, if the distinction is drawn between the technical issues in a divorce case and the technical issues in a subsequent legitimacy case, absurd and unpopular results will follow. In the one case, a jury may find that the appellant bore a bastard child, whereupon the judge dissolved her marriage, while in the other it may be held that the child is no bastard but his putative father's son; for the father's mouth is undoubtedly closed by the law in legitimacy proceedings. I do not see why we should be dismayed at this. If the petitioner could have made out his case by the evidence of third persons, tending to prove and sufficiently proving his non-access, precisely the same results would happen, and this contradiction could not be helped. When two persons are indicted for criminal acts committed on one another and are not tried at the same time, one may be acquitted and the other convicted; yet no one proposes that the acts should for that reason no longer be regarded as an offence at all. The accident of different results arrived at on the two trials is recognized as an accident. No difficulty will arise in such a case as the present if people will only realize that the trial of a petition for divorce between spouses is not in fact or in law the trial of an issue as to the legitimacy of another person, that what is evidence on the one occasion is not evidence on the other, but that the child can

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Sumner.

only be affected legally in proceedings, to which he is a party, and by evidence that is admissible against him and is not given behind his back. This may be paradoxical and incongruous, but it is the basis of legal and fair trial.

I am not at all insensible to the possibility, that has been pointed out, of perjured evidence of non-access by a husband being the means of casting off an innocent wife and child. The suggestion is rather one for melodrama than for the disillusioned minds of those who know the Divorce Court, but the risk, great or small, must be run. Every enlargement of the classes of competent witnesses and of admissible questions is accompanied by a certain amount of perjury. Such is the unregenerate nature of man, but judges and juries are not wholly unaware of it, and are the best protection that we have. After all, a great many witnesses are honest and a good many perjurers are transparent, and quoad ultra we must hope for the best. The law has gone too far and too long in the direction of admitting all material testimony to warrant a latter-day extension of an archaic rule against the admissibility of material evidence, for fear lest a few scoundrels might try, peradventure, with occasional success, to get the better of counsel, jury and judge, to say nothing of the Court of Appeal and of your Lordships.

My Lords, my own view is that in the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth. To ordain that a Court should decide upon the relevant facts and at the same time that it should not hear some of those relevant facts from the person, who best knows them and can prove them at first hand, seems to me to be a contradiction in terms. It is best that truth should out and that truth should prevail. With this, if the matter were one of first impression and we were free to lay down an ideal procedure, I think all must agree. As it is, the rule in *Goodright's Case* exists and must be applied, but only when it is applicable. It is of ancient origin, the product of conditions no longer clearly known and of social necessities no longer existing in the form in which they arose. The reasons for it have been

variously stated and have never been very clear. It has never been applied in a divorce case and to such a case it is, in my humble opinion, in its nature inapplicable. I can be no party to the extension of such a rule to new cases, where it must work anomalously and cannot produce the results for which it appears to have been devised, and I therefore think that the opinions of the judges in both Courts below were right, that the evidence was properly admitted, and that the appeal should be dismissed.

LORD CARSON. My Lords, I agree with the learned judge who tried this case, with the Court of Appeal, where the three learned judges were unanimous, and with my noble and learned friend Lord Sumner, that the evidence of the respondent was admissible on the issue of adultery to prove non-access or non-connection with his wife the appellant.

This is the only question which this House is now called upon to decide, as your Lordships have already held that it is not open to the appellant here to raise the question that the verdict was against the weight of evidence—that ground of appeal having been abandoned in the Court of Appeal by counsel on behalf of the appellant. Your Lordships have also been satisfied that there was no misdirection by the learned judge at the trial, and that the case was properly submitted to the jury. Indeed, no one could read the summing-up of the learned judge without feeling how impressed he was with the seriousness of the duty cast upon him, and the jury who tried the case; and his warning to the jury as to the burden of proof and the duty of the petitioner to satisfy the jury beyond reasonable doubt that the child was not begotten by him is, I think, the best answer that can be given to some of the extreme and hypothetical cases put by some of your Lordships—as showing the care and fairness with which our laws are administered to prevent injustice. Having regard to some of the observations made, I should like to add that in many cases of the vilest and most unfounded charges, trial by jury has hitherto proved the only efficacious protection for the subject attempted to be implicated. I must decline therefore to be any party to

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Carson.

throwing any doubt upon the verdict of the jury or to being influenced by the fact either that the charges against certain named co-respondents have failed or that there was no confession which could be used against the appellant. The question to be decided is purely one of law, and, as I understood the argument of Sir Douglas Hogg on behalf of the respondent, it was limited to this, that the rule relied upon by the appellant's counsel as stated by Lord Mansfield in *Goodright* v. *Moss* (1), assuming that it still exists, has no application in a proceeding for a divorce when the issue is whether the wife has been guilty of adultery with a man unknown.

Before dealing with this rule it is, I think, important to remember that it was not until 1857 (20 & 21 Vict. c. 85) that a Court was established in this country with power to dissolve marriages, and that it was not until 1869 (32 & 33 Vict. c. 68) that " the parties to any proceeding in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceedings."

My Lords, I have read carefully all the cases which have been cited on behalf of the appellant, and I agree with the Master of the Rolls that they are all decisions in which the legitimacy of a child was directly in issue and was the question to be tried with legal consequences flowing from the result of the issue. It is unnecessary for me at this stage to go through them in detail. *Rex* v. *Luffe* (2); *Rex* v. *Kea* (3); *Rex* v. *Sourton* (4), the three cases mainly relied upon since the dictum of Lord Mansfield in *Goodright's Case*, were all cases coming under the administration of the poor law and in which the legitimacy of the child was the direct issue, with resultant legal consequences involving the status of the child according to the finding of legitimacy or illegitimacy, and it is not unimportant to observe that, as stated by Denman C.J. in *Reg.* v. *Wye* (5), a judgment deciding the settlement of a person included in the order was a " judgment in rem " " conclusive, not only between the parties, but against the world." In the *Poulett Peerage Case* (6) the

(1) 2 Cowp. 591.
(2) 8 East, 193.
(3) 11 East, 132.
(4) 5 Ad. & E. 180.
(5) 7 Ad. & E. 761, 769.
(6) [1903] A. C. 395.

issue was the legitimacy of a child born after marriage but of which the wife was pregnant at the date of her marriage, and the dicta of Lord Halsbury relied upon by the appellants, if they had any relevance at all, must have been with reference to a case when the direct issue to be tried was the legitimacy of the child. If his Lordship laid down or intended to lay down as a general proposition, which I do not think he did, that the law did not permit the sanctity of married intercourse to be inquired into in any Court of law, I am bound to say I can find no authority to support such a proposition. Indeed, any such rule would go far beyond the statement of Lord Mansfield or any of the other cases relied upon by the appellants. The *Aylesford Peerage Case* (1) also involved the direct issue of the legitimacy of the child in question.

My Lords, I do not think it is necessary to decide whether the rule as laid down by Lord Mansfield was altered by the Act of 1869 to which I have already referred, as in my opinion the only authorities cited show that it was only applied in cases where the direct issue was the question of the legitimacy of a child. It is a remarkable fact that so far as the reports show no attempt to apply the rule has ever been made in the fifty-five years that have elapsed since the passing of this Act in the trial of such issues as adultery, condonation, custody of children, etc. If you take the rule as founded on decency and morality the very nature of the issues to be tried from day to day in the Divorce Court shows how constantly such decency and morality has to be outraged, and the books are full of cases where, to use the words of Lord Dunedin, the most secret and at the same time the most sacred of the most legitimate relations of man and woman as husband and wife are laid bare before all the world. I do do not merely refer to cases of nullity, when the very nature of the case requires the most painful disclosures by husband or wife, but also to cases as to whether intercourse put an end to a deed of separation: *Rowell* v. *Rowell* (2); whether intercourse was refused: *Rippingall* v. *Rippingall* (3); whether spouse was unable or unwilling to consummate marriage,

(1) 11 App. Cas. 1. (2) [1900] 1 Q. B. 9. (3) (1876) 24 W. R. 967.

H. L. (E.) 1924

RUSSELL v. RUSSELL.

Lord Carson.

thereby excusing desertion: *Ousey* v. *Ousey* (1); and many other cases.

Indeed the Master of the Rolls, who, it must be remembered, was himself for a while the President of the Probate and Divorce Division, has in his judgment stated (2): "I think there are cases which have been cited before the late Lord St. Helier, before the late Lord Hannen, and before other judges of the Divorce Court, which all go to show that in their opinion, according to the practice of the Divorce Court, such evidence could be given, whether upon questions of adultery or sometimes on the question of the custody of children, where the question of the paternity comes in issue," and his Lordship approved of such practice. My Lords, having practised to a considerable extent for some years in the Probate and Matrimonial Division, I venture to express my concurrence with the Master of the Rolls.

I think it is well to refer to two of such cases, because they seem to me to be entirely at variance with the rule the application of which is contended for in this case. In *Gordon* v. *Gordon* (3) a wife alleged that the last child born during wedlock was the child of the co-respondent, and in a written confession, which she signed, she stated that she had misconducted herself with the co-respondent, and that he was the father of her child. At the trial the father was cross-examined with a view to showing the child was not his, and the President laid it down that, for the purpose of raising a question as to custody, the wife should have filed an answer to the suit raising the question of paternity. In the case of *Hetherington* v. *Hetherington* (4), where an order had been made under s. 4 of the Matrimonial Causes Act, 1878, authorizing a wife to refuse to cohabit with her husband and it was sought to rescind such order on the ground of the wife's adultery, the justices refused to receive direct evidence of the husband or the admission of the wife as to the paternity of the child. Sir J. Hannen (afterwards Lord Hannen), the President of the Court, reversed the decision of the justices and stated as follows: "Unfortunately in refusing

(1) (1874) L. R. 3 P. & M. 223.
(2) [1924] P. 14.
(3) [1903] P. 92.
(4) 12 P. D. 112, 114.

to act on evidence of the parties, they" (the magistrates) "seem to have been under the impression that the issue was one of bastardy which it was not, but one of adultery," and he there drew exactly the distinction which the Master of the Rolls has taken in the present case.

My Lords, having listened carefully to the arguments in this case I am not at all certain that I understand how far it is contended the rule in question should be applied in cases where the issue to be tried is not the illegitimacy of the child or involving any legal consequences to the child. For instance, in the present case it is said the evidence of the father as to non-access is inadmissible because it would bastardize the child—would the evidence be inadmissible if no child had been born but the mother had a miscarriage which would equally prove the adultery? If a woman confessed "I committed adultery with A. B. when my husband was abroad," would the admissibility of this confession depend upon whether a child was born or not, and would the husband be able to give such evidence on an issue of adultery in the one event and not in the other?

My Lords, let us take another case where the issue is condonation by resuming cohabitation. Supposing a woman avers that her husband resumed cohabitation after knowledge of her adultery and thereby condoned it, will he be allowed to give evidence that no such cohabitation took place if no child has been born, and will he be precluded from giving such evidence if in the meantime a child has been born? —the knowledge of the conception of which may have been the very reason why the woman invented a false story of the husband's intercourse.

Attention has been drawn to the anomaly which would be created if the present verdict is to stand, and my noble and learned friend, Lord Finlay, has remarked in the course of his speech: "To what an extraordinary state would the admission of this evidence in the present case reduce the law of England! The infant may be illegitimate for the purpose of proving adultery; but legitimate for the purpose of succeeding to property or title." I should like, however, to point out that exactly the same result would follow if

H. L. (E.) 1924 RUSSELL v. RUSSELL. Lord Carson.

non-access was proved by a witness other than the father, which would admittedly be legal proof and that, further, under such circumstances it would be open to a Court before whom the direct question of the child's legitimacy was tried to disregard the verdict of adultery and to come to the conclusion that the child was legitimate! But, my Lords, to what an extraordinary state would the rejection of this evidence in the present case reduce the law of England! Here is a husband who knows, and who has proved to the satisfaction of a jury that he has not had access or connection with his wife, and that his wife therefore must be guilty of adultery, and he is to be informed that the law of England gives him no relief, and binds him to his adulterous wife, because he is not allowed to give evidence which he alone is capable of giving!

My Lords, I can find no rule of law which excludes the husband's evidence to prove his wife's adultery, and I am therefore of opinion that the verdict of the jury, which cannot be challenged if the evidence was admissible, should stand, and that this appeal should be dismissed. The question of whether, apart from the evidence of the husband, there was evidence proper to be submitted to the jury has not been argued before us, and I therefore express no opinion upon it.

Order of the Court of Appeal reversed, and verdict and judgment set aside. The respondent to pay the costs in the Court of Appeal, and also the costs in this House so far as regards the question of the admissibility of the evidence: The appellant to pay the costs in this House so far as regards the questions of misdirection and verdict against the weight of the evidence, such costs to be set off. Cause remitted back to the Probate, Divorce and Admiralty Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, May 30, 1924.

Solicitors for the appellant: *Withers & Co.*

Solicitors for the respondent: *Taylor & Humbert.*

[PRIVY COUNCIL.]

IMPERIAL TOBACCO COMPANY OF INDIA, LIMITED . . . . . } APPELLANTS;

AND

BONNAN AND OTHERS . . . . . RESPONDENTS.

J. C.*
1924
May 13.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Trade Mark—Passing Off—Reputation as Importer of Brand—Claim to exclusive Rights in India—Absence of Misrepresentation or Infringement.

An importer may acquire a valuable reputation for himself and for his wares by his care in selection, or his precautions in transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness. But apart from contract or misrepresentation there is nothing to prevent a person from acquiring goods from a manufacturer and selling them in competition with him, even in a country into which the manufacturer, or his agent, has been the sole importer.

The appellants sought to restrain the respondents from selling in India a well-known brand of cigarettes which for some years they alone had been importing into and selling in India; they were assignees of the trade mark and goodwill for India. The respondents having bought over 21 millions of the cigarettes cheaply from purchasers from the manufacturers (who had granted the appellants the sole rights for India) were able to undersell the appellants. The sales by the respondents involved no breach of contract, misrepresentation or infringement; further it was not shown that the appellants had acquired any independent reputation as importers:—

Held, that the suit was not maintainable.

Judgment of the High Court (I. L. R. 50 C. 762) affirmed.

APPEAL (No. 142 of 1923) from a decree of the High Court in its Appellate Civil Jurisdiction (April 10, 1923) affirming a decree of that Court in its Ordinary Original Civil Jurisdiction (July 18, 1922).

The appellants brought a suit in the High Court against the respondents for a declaration that they were the sole owners in India, Burma, and Aden of a certain brand, trade mark, trade name, covering, wrapper or label, and the name W. D. and H. O. Wills, and that they were solely entitled within the said limits to the exclusive rights of

* *Present:* LORD PHILLIMORE, LORD BLANESBURGH, LORD DARLING, SIR JOHN EDGE, and MR. AMEER ALI.

J. C. 1924 — IMPERIAL TOBACCO COMPANY OF INDIA, LD. v. BONNAN.

user thereof, and solely entitled to import into the said territories tobacco and cigarettes in tins, boxes or other receptacles bearing the said brand, trade mark, trade name, etc. The appellants also prayed for an injunction and damages. By their plaint they alleged infringement of the rights and property in the brand, trade mark, trade name, etc., also that the respondents had impaired their reputation and the reputation of the cigarettes sold by them.

The facts appear from the judgment of the Judicial Committee.

The trial judge (Pearson J.) dismissed the suit, and that decision was affirmed upon appeal by Sanderson C.J. and Richardson J.

1924. April 7, 8. *Clauson K.C., Maugham K.C., Sebastian* and *F. E. Bray* for the appellants.

S. Hyams for the respondents.

The arguments were directed chiefly to the evidence. For the appellants reference was made to *Lecouturier* v. *Rey* (1) and *Dental Manufacturing Co.* v. *De Trey & Co.* (2) For the respondents reference was made to *Spalding* v. *Gamage* (3) and (on concurrent findings) to *Ram Anugra Narain Singh* v. *Chowdhry Hanuman Sahai.* (4)

May 13. The judgment of their Lordships was delivered by

LORD PHILLIMORE. Before the year 1901 the company known as W. D. and H. O. Wills, Ld., had begun to manufacture a particular cigarette which got to be known as Gold Flake or Wills' Gold Flake, and which soon acquired a considerable reputation.

In the year 1901 W. D. and H. O. Wills, Ld., and various other companies, became amalgamated into one company called the Imperial Tobacco Company (of Great Britain and Ireland), Ld., and the whole business of W. D. and H. O. Wills, Ld., with its goodwill and trade marks, was assigned to the Imperial Tobacco Company (of Great Britain

(1) [1910] A. C. 262.
(2) [1912] 3 K. B. 76.
(3) (1915) 32 R. P. C. 273.
(4) (1902) L. R. 30 I. A. 41.

and Ireland), Ld. In September, 1902, this last-named company made an agreement with a company called the American Tobacco Company, by which it was agreed that the American Tobacco Company should confine its trade to the United States and certain islands, and that the Imperial Tobacco Company (of Great Britain and Ireland), Ld., should confine its trade to Great Britain and Ireland, and that these two companies should form a third, to be called the British American Tobacco Company, Ld., which should confine its trade to the rest of the world not included in the territories of the two first companies. And accordingly the British American Tobacco Company, Ld., was incorporated; and to it the other two companies assigned their business, goodwill and trade marks outside their respective territories; and mutual covenants were entered into by the three companies confining their trades to their respective territories.

At some date not specified in the record, a company called the British American Tobacco Company (India), Ld., was incorporated to act as distributors in India for the British American Tobacco Company, Ld.

By an agreement made September 1, 1910, between the British American Tobacco Company, Ld., of the first part, the British American Tobacco Company (India), Ld., of the second part, and the appellant company of the third part, it was agreed that the appellant company should buy the goodwill, business, rights and other assets of the British American Tobacco Company, Ld., in India and certain other territories, with brands, trade marks, trade names, formulæ and recipes, and the sole right and title to use in that territory the name of the British American Tobacco Company, Ld., and the names of all firms and companies which it had acquired, and also the goodwill, business rights and assets of the British American Tobacco Company (India), Ld. This agreement, however, was not perfected by an assignment. By an indenture dated April 11, 1922, and made between the British American Tobacco Company, Ld., and the appellant company—but to which the other company was not a party—the British American Tobacco Company, Ld.

J. C. 1924 — IMPERIAL TOBACCO COMPANY OF INDIA, LD. v. BONNAN. —

(so far as it was concerned), performed its agreement by assigning all the premises comprised in the agreement to the appellant company.

The Gold Flake cigarettes in question were sold at one time in tins of fifty cigarettes and afterwards in packets of stiff paper, each containing ten cigarettes. On the broad flat top of the packets appeared in bold letters words showing that they were Gold Flake cigarettes and the name of W. D. and H. O. Wills, Bristol and London; and on the back, with a number of medals, there was an inscription in the following words :—

" Every genuine package of Gold Flake
Cigarettes has the signature thus :
W. D. and H. O. Wills."

On one of the ends of the packet—if they were packets to be sold in India by the appellant company—appeared in very small print :—

" This label is issued by the
Imperial Tobacco Co. of India, Ld.
Registered Trade Mark.
Successors in India to W. D. and H. O. Wills
Cigarettes, made in England."

If they were manufactured by the British American Company for sale elsewhere, the words, in lettering of the same small size, were :—

" Established by W. D. and H. O. Wills, Bristol and
London, British American Tobacco Co., Ld.
Registered Trade Mark.
Bristol, London, Liverpool and Virginia.
Successor. Made temporarily in the U.S.A."

No reliance was placed in argument by either party upon the difference in the two inscriptions at the ends of the packets.

The only other difference between the packets to be used in India and those to be used elsewhere was that the paper for the Indian packets was of somewhat stouter material so as to afford a better resistance to damp.

Packets with this distinctive appearance and these trade

marks were manufactured by the British American Tobacco Company, Ld., and imported and distributed by the British American Tobacco Company (India), Ld., from about 1902 till the date of the agreement in 1910; after which date they were imported and distributed by the appellant company. The manufacture was carried out by the British American Tobacco Company, Ld., at first in England, afterwards temporarily in the United States of America.

In the year 1921 the respondent Bonnan purchased about 21½ millions of Gold Flake cigarettes, surplus stores sold by the British Army canteen authorities, the sale being subject to the condition that they were not to be resold in the United Kingdom. These cigarettes had been sold, in the first instance, to the British canteen authorities by the British American Company, Ld. After so acquiring them the respondent Bonnan formed the respondent company, and the respondents shipped a large quantity of these cigarettes to India and offered them for sale there. Thereupon on May 11, 1922, the appellant company brought a suit in the High Court at Calcutta, claiming an injunction to restrain the respondents from selling these cigarettes in India.

There being no trade marks Act in force in India, the case for the appellant company was rested upon the ordinary rights of every trader to protect his property and to prevent attempts by other traders to avail themselves of his reputation to pass off their goods as his own.

The issues which were settled were accordingly addressed to these points, the more important being those numbered (1.), (2.), (5.) and (8.), which are as follows: "(1.) Does the get-up of the cigarettes described in para. 7 of the plaint denote to purchasers in India that such cigarettes are imported by the plaintiff company? (2.) Will the sale by the defendant company of cigarettes in such get-up deceive the purchasers into the belief that the cigarettes have been imported by the plaintiff company? (5.) Is the plaintiff entitled as against the defendants either by reason of such importation or by reason of such purchase to prevent defendants from selling cigarettes with such get-up, though they have in fact been

J. C. 1924 — IMPERIAL TOBACCO COMPANY OF INDIA, LD. v. BONNAN.

manufactured by the British American Tobacco Company ? (8.) Are plaintiffs entitled to protect their right by injunction irrespective of consideration mentioned in the first two issues ? "

The case was then heard upon oral evidence by Pearson J., who found on these issues against the appellant company and dismissed the action ; and his decree was affirmed on appeal by Sanderson C.J. and Richardson J. It is from this affirmance that the present appeal has been brought.

At the trial some evidence was given on behalf of the appellant company in order to show that it had a reputation as the sole vendor in India of Gold Flake cigarettes and that the respondents were trading upon this reputation. It is possible for an importer to get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness ; and if therefore goods, though of the same make, are passed off by competitors as being imported by him, he will have a right of action.

But the evidence offered by the appellant company was met and in the opinion of the learned judges displaced by the evidence given on behalf of the respondents.

Thus Pearson J. said : " I find, therefore, upon this part of the case that the reputation of the brand of Gold Flake cigarettes in India is the reputation of the maker and not of the plaintiff company as importers. The reputation originated in the days of Messrs. W. D. and H. O. Wills, the original manufacturers, and the efforts of the plaintiff company have been directed not to creating or acquiring (if such a thing is possible) an importer's reputation for themselves in the brand, but in maintaining and developing the reputation of the brand as a manufacturer's brand. The issues, therefore, dependent upon this finding are answered in favour of the defendant." And Sanderson C.J. : " There is no necessity for me to refer to the evidence in detail, for I agree with the learned judge's finding of fact. In my judgment the sole representation made by the plaintiffs' user of the covering

of the cigarettes was a representation that the cigarettes were the Gold Flake cigarettes manufactured by the successors of the well-known firm of W. D. and H. O. Wills. There is no evidence to justify the alleged representation (on which the plaintiffs relied) that cigarettes, bearing the said wrapper or covering, had come through a particular channel or had been imported by the plaintiffs. In the same way the defendant by using the wrapper or covering was merely representing the cigarettes as Gold Flake cigarettes manufactured by the successors of the well-known firm of W. D. and H. O. Wills, namely, the British American Tobacco Company. This was a perfectly true representation, and the defendant was in no way passing off or attempting to pass off the cigarettes sold by him as the plaintiffs' goods." And finally Richardson J.: "Moreover, the learned judge, Pearson J., before whom the case came in the first instance, has found, and, in my opinion, on the evidence rightly and conclusively found, that up to the date of the suit the company had acquired no independent reputation as importers. Nor do they use any distinctive importers' mark."

Their Lordships see no reason to review these concurrent findings. Indeed they were not invited to disturb them as findings of fact; but it was suggested that the learned judges had arrived at them as mixed findings of fact and law and in so doing had erroneously applied the law.

Another way of putting the case for the appellant company was suggested by counsel, which was to treat the first issue as wrongly stated. It ought, it was said, to have run as follows: "Does the get-up of the cigarettes denote the plaintiffs' goods?" But even if the appellant company were to be allowed so to remodel the issue, its case would not be further advanced. The appellant company has still, as it was admitted, to show that the respondents are selling goods, not the production, or introduction, of the appellant company, in such a way as to lead customers to believe that they are the goods which the appellant company has introduced or marketed.

And the answer is twofold: (1.) It is an immaterial

J. C. 1924 IMPERIAL TOBACCO COMPANY OF INDIA, LD. v. BONNAN.

accident that these particular wares had from 1910 onwards been brought into India by the appellant company and the appellant company only, if the appellant company got no reputation in consequence ; (2.) the respondents are doing nothing to mislead customers and are breaking no covenants.

In truth, as was observed during the course of the argument, all the business about acquiring title from the British American Tobacco Company, Ld., or the British American Tobacco Company (India), Ld., which latter was never perfectly acquired: see *Performing Right Society* v. *London Theatre of Varieties* (1), is beside the question. No trade mark or trade reputation of either of these companies is infringed. The right on which the appellant company is seeking to rely is something which it claims to have earned for itself since 1910 ; and this right, as the learned judges have found, it has failed to establish.

There is nothing to prevent a tradesman acquiring goods from a manufacturer and selling them in competition with him, even in a country into which hitherto the manufacturer or his agent has been the sole importer. It is not likely to be a successful business operation, unless in some exceptional case. This is just such an exceptional case. The British American Tobacco Company, Ld., might, when they sold this large consignment to the British Army canteen authorities, have required an undertaking that they should not be resold in India or to any one who could lawfully resell in India. This it appears not to have done ; and then there arose the question of the disposal after the war of this large surplus stock.

The respondents, being unhampered by covenant, are selling goods manufactured by the British American Company as being what they are—namely, Wills' Gold Flake cigarettes manufactured by that company. There is no untruth and no attempt to deceive. The appellant company says that all genuine Wills' Gold Flake cigarettes sold in India must be their goods. It may be answered that this has been so in times past as a mere matter of fact, and because the

(1) [1924] A. C. 1.

appellant company was protected by a covenant with the manufacturers; but not because it had a title to a monopoly which it could enforce against strangers to the covenant.

The claim of the appellant company is that it can stop a trader, to whom goods have been lawfully sold under a particular description and by whom they have been lawfully bought under that description, from reselling them under the same description. Such a claim sounds extravagant. It might, however, possibly be maintained, if it could be shown that the time, place or circumstances of the resale imported some representation, that the goods were other than what they were. But in this case there is no such time, place or circumstance.

It is not as if the respondents were attempting to pass off as Wills' Gold Flake cigarettes stuff not manufactured by the lawful successors in title of W. D. and H. O. Wills. Any such attempt would be at once restrained at the suit of the lawful successors; and in India and for India the appellant company would be the lawful successors.

There is nothing in the judgments in the Courts below or in the opinion which their Lordships are now expressing to give countenance to the idea that the ordinary principles of jurisprudence with regard to trade marks and those forbidding the passing off of goods do not apply in India. But the cigarettes now in dispute are the genuine articles, lawfully acquired from the lawful manufacturers; and as such the respondents may sell them.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants: *Fred. F. Macnaghten.*
Solicitors for respondents: *Sandersons & Orr Dignams.*

[PRIVY COUNCIL.]

J. C.* 1924 March 26.

THOMPSON . . . . . APPELLANT;

AND

NEW SOUTH WALES BRANCH OF THE BRITISH MEDICAL ASSOCIATION . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Restraint of Trade—Medical Association—Expulsion of Member—Rule excluding expelled Member from professional Recognition—Libel—Privileged Occasion.

One of the declared objects of the respondent branch association was "the maintenance of the honour and the interests of the medical profession." Its articles of association provided for the expulsion of a member by a resolution of its council if carried by three-quarters of those present, and confirmed by a general meeting. By a rule of the branch association existing when the appellant became a member, "when any member shall have been expelled he shall not be met in consultation or accorded professional recognition in any other form until it shall have been otherwise decided by the council." A further rule provided that if any member should be declared by the council to have omitted to comply with any of its rules, he was not to be met in consultation or recognized. A resolution expelling the appellant from membership was duly carried by the council and confirmed by a general meeting, the appellant being present, and heard in his defence, at both meetings; the resolution was communicated in writing by the secretary to the other members. The appellant brought an action against the respondents for damages alleging (inter alia) that the respondents had conspired to induce medical practitioners, members of the association, to refuse to meet him or to accord him professional recognition; and he contended that the rule set out above was in restraint of trade and void. He also claimed damages for defamation:—

Held, (1.) that the rule was not in restraint of trade, since its object was not to penalize an expelled member, but to promote the interests and objects of the respondents; (2.) that the council and the general meeting, when considering the resolution, were acting quasi-judicially, and that the decisions arrived at, being supported by adequate evidence, could not be questioned without proof of fundamental error in the procedure, or bias or malice in those present; (3.) that the occasion of the publication of the resolution was privileged; and (4.) that the action failed.

Judgment of the Full Court affirmed.

APPEAL (No. 136 of 1923) from a judgment of the Supreme Court of New South Wales (May 7, 1923), setting aside the

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD WRENBURY, and LORD DARLING.

verdict and judgment entered for the appellant at the trial of an action in which the appellant was plaintiff and the respondents were defendants.

The circumstances in which the action was brought appear from the judgment of the Judicial Committee; the arguments were directed principally to the facts of the case.

1924. *Sir Walter Schwabe K.C.* and *Hon. Geoffrey Lawrence* for the appellant contended (inter alia) that rr. 1 and 2 of the regulations as to "intra-professional restrictions" were illegal and unenforceable as being in restraint of trade, and that consequently they could not be used to justify what otherwise would be a wrongful conspiracy. They referred to *Quinn* v. *Leathem* (1); *Pratt* v. *British Medical Association* (2); and *Sorrell* v. *Smith.* (3)

Sir John Simon K.C. and *Sir Hugh Fraser* for the respondents contended that the above rules were not in restraint of trade, referring to *Attorney-General of Australia* v. *Adelaide Steamship Co.* (4) and *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (5); and that, having regard to the resolutions, the rules, and the facts proved, the action was not maintainable.

Hon. Geoffrey Lawrence replied.

March 26. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the full Court of the Supreme Court of New South Wales, dated May 7, 1923, by which a verdict of a jury in favour of the appellant for the sum of 2000*l.* damages and the judgment entered up thereon dated December 15, 1922, were set aside and judgment entered for the respondents.

One of the difficulties in the case is to ascertain clearly and distinctly in respect of what cause or causes of action this large sum was awarded. It is stated in para. 52 of the appellant's case that there were five counts in the plaintiff's

(1) [1901] A. C. 495.
(2) [1919] 1 K. B. 244.
(3) [1923] 2 Ch. 32.
(4) [1913] A. C. 781.
(5) [1892] A. C. 25.

J. C. 1924 THOMPSON v. BRITISH MEDICAL ASSOCIATION (N. S. W. BRANCH).

statement of claim, that in respect of the first the jury awarded 250*l.*, in respect of the second 750*l.*, in respect of the third 300*l.*, in respect of the fourth 350*l.*, and of the fifth 350*l.*, making 2000*l.* in all, but when one turns to the statement of claim, which does not bear the signature of any professional man, it covers four closely printed pages of the record, and is involved, confused, inflated, and only made intelligible by a close perusal. It will, in their Lordships' view, conduce to clearness, and to a distinct appreciation of the appellant's alleged causes of action, if the facts out of which these causes of action are said to have arisen be first stated with reasonable brevity.

The appellant is a medical man duly qualified. He took his diploma in 1906, became a fellow of the English College of Surgeons in 1911, subsequently went to South Africa and practised there till 1915, when he went to Australia, practised for a short time in Victoria and then in Sydney. He was a member of the British Medical Association in Great Britain, and its branches in South Africa and Victoria. On arriving in Sydney, New South Wales, he became automatically a member of the local branch of the Medical Association. He has made that association defendants and presses against it his alleged right to receive from it 2000*l.* damages. On his becoming a member of this branch he received a copy of its rules.

One would naturally expect that having previously been a member of the parent association—the British Medical Association, and also of the two branches in South Africa and Victoria—he would be well acquainted with their respective rules, and especially with the rules of the branch which he has made defendant, and would have objected to anything in them of which he disapproved. Until this action commenced he apparently found no fault with these rules. He, it would seem, then discovered that they contained agreements in restraint of trade and many oppressive if not illegal provisions.

It is thus essential at the initial stage of this appeal to refer to the memorandum and articles of association in order

to see what were the purposes the association was designed to subserve, what objects to effect, what interest to foster and promote, what honourable practices in the medical profession it desired to encourage, what malpractices to suppress, and lastly what were the methods and machinery by which it has sought to effect these desirable ends. The third section of the memorandum of association sets forth in the following words the general objects for which the association was established: "(1.) The promotion, either in conjunction with the British Medical Association or other similar body or bodies or otherwise, of medical and the allied sciences and the maintenance of the honour and the interests of the medical profession by the aid of all or any of the following." Under five sub-heads are then enumerated and described the methods by which the above-mentioned objects might be effected. They are: "(*a*) Periodical meetings of the members of the association and of the medical profession generally in different parts of this colony (i.e., the colony of New South Wales). (*b*) The publication of such information as may be thought desirable in the form of a periodical journal which shall be the journal of the association. (*c*) The occasional publication of transactions and other matters. (*d*) The grant of money out of the funds of the association for the promotion of the medical and allied sciences in such manner as may from time to time be determined on. (*e*) And such other lawful things as are incidental or conducive to the attainment of the above objects."

In the succeeding fifteen sub-sections of this section other methods are mentioned. It will be only necessary to refer to a few of them. Sub-s. 2, which runs: "To form a bond of union among the members of the profession and a medium through which their opinions can be easily ascertained or expressed. (4.) To collect and circulate statistics and other information relating to the medical or allied sciences or the medical profession. (5.) To advance the general and social interests of the profession. (6.) To promote fair and honourable practice, to suppress malpractice, to settle disputed points of practice, and to decide all questions of professional

J. C. 1924 THOMPSON v. BRITISH MEDICAL ASSOCIATION (N. S. W. BRANCH).

usage and courtesy." These are all legal, worthy, and, indeed, humane objects. They are to be furthered by the association, since they aimed at raising the "moral" of the profession, the keeping of it abreast of the medical knowledge derived from scientific medical research, as well as the promoting of peace, courtesy and goodwill amongst the members of the association. It would be a great mistake to suppose that if the association succeeded in their efforts members of the medical profession alone would reap the entire benefit. The community which supply the sick, injured and ailing ones whom their members of the profession prescribe for and treat are also benefited.

It is obvious that it is essential, if the standard of knowledge and conduct which the association aim at establishing was to be kept up, that means should be provided of getting rid of a member who violated their rules, or whose conduct offended against the honour or interests or repute of the profession. Accordingly it is provided in art. 34 of the articles of association that any member may be expelled from the association by a resolution of council if carried by three-fourths of the members present, subject to confirmation by a general meeting, and that he shall thereupon cease to be a member. Twenty-eight days' notice of the intention to propose such a resolution must be given to any member affected.

Art. 35 provides that: "Any member of the association who shall have been convicted in a court of justice of any criminal offence, or whose name shall have been erased from the medical register aforesaid on account of infamous conduct in any professional respect, shall ipso facto cease to be a member of the association, but any such member shall be eligible for re-election in the event of his name being restored to the medical register." The association made, as they were entitled to do, regulations providing for the mode and manner in which the powers conferred upon them by the memorandum of association and articles of association shall be exercised.

Under the heading of "intra-professional restrictions" regulations 1 and 2 are to be found, which run thus:

"(1) Where any member shall have been expelled he shall not be met in consultation or accorded professional recognition in any other form by any member until it shall have been otherwise decided by the council." No. 2 runs as follows: "Where any medical practitioner shall have been declared by the Council (*a*) To have been guilty of conduct detrimental to the honour and interests of the profession and calculated to bring the profession into disrepute, or (*b*) to have grossly contravened the custom of the medical profession, or (*c*) to have acted detrimentally to the interests of the association or omitted to comply with any of its rules or resolutions; no member shall consult with or extend professional recognition in any other form to such practitioner until it shall have been otherwise decided by the council."

During the argument it was persistently urged that this regulation operated in general restraint of trade and was therefore void. That involves a misuse of language. Even if it did so operate it would not be void at common law but merely unenforceable at law, while under ss. 3 and 4 of the Trades Union Act, 1871, it would be valid at law, but not directly enforceable: *Joseph Evans & Co.* v. *Heathcote.* (1) But the more important consideration is this, that this regulation was framed long before the appellant became a member. It was not specially directed at him. The respondents have not attempted to enforce it in any way whatever. It is not designed to coerce. It can only coerce—if coerce at all—members of the association. People who never were members, or, like Dr. Thompson, were members, but have ceased to be so, may snap their fingers at the association, and as far as that body is concerned meet in consultation with any one they please. The object of the rule is, in their Lordships' view, not to penalize or impoverish or injure Dr. Thompson, or any former member, but solely to keep up the discipline of and "moral" of the members of the association to protect and promote its interests, though indirectly and as an entirely undesigned result some injury may incidentally be sustained by an expelled member in the

(1) [1918] 1 K. B. 418.

J. C. 1924 THOMPSON v. BRITISH MEDICAL ASSOCIATION (N. S. W. BRANCH).

practice of his profession. The difference between two such intentions is well established in trade competition. A trader may deliberately with the object of securing and developing his trade, by advertisement, lowering of prices or suchlike means, do something which may result in injuring the trade of a rival trader, but if that be not the designed and intended results of the first trader's action, but only an undesigned incidental consequence of it, the first trader is blameless. The well-known case of *Mogul Steamship Co.* (1) establishes this distinctly.

Lord Parker, in delivering judgment in the case of *Attorney-General of Australia* v. *Adelaide Steamship Co.* (2) laid down the law on this point with his usual clearness and precision; as to trading contracts in alleged restraint of trade, he said: "Further, it must be remembered that the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the Court, to be determined after construing the contract and considering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible." In the present case the contract, if made at all between Dr. Thompson and the association, must have been made when he was admitted a member of it.

Lord Parker proceeded: "It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similarly combinations, not amounting to contracts in restraint of trade, were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract or combination to do something unlawful or something lawful by unlawful means. The right of the individual to carry on his trade or business in the manner he considers best in his own

(1) [1892] A. C. 25. (2) [1913] A. C. 781, 797.

interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others: *Mogul Steamship Case.*" (1)

Their Lordships can see no reason why the principle of this last case should not apply as between an organized medical association, such as the defendant association, with its aims, objects and duties, and a former member who has been expelled from its ranks and whose practice may be injured by reason of that expulsion.

The contract between the appellant and the association was entered into when he became a member of it. By that act he must be held to have agreed to be bound by its rules and regulations and to observe the provisions of the memorandum of association, and the articles of association and regulations.

It is not quite clear whether his counsel contended that the special provisions of the regulations entitled "intra-professional restrictions" amounted by themselves to a contract in restraint of trade, and were severable from the remainder of the contract, or whether they by their presence in the contract vitiated it entirely and made it, taken as a whole, a contract in restraint of trade. Both the constructions contended for are, in their Lordships' view, erroneous. Their Lordships think the contract entered into by the appellant and the association is, having regard to the authorities, valid and binding.

Turning now to the lengthy, involved and almost incomprehensible pleadings, it would almost appear to their Lordships that whoever drew them must have endeavoured to introduce into them all the averments necessary to bring the case within the authorities, in utter disregard of the fact that no evidence was available to sustain these averments.

The learned Chief Justice has condensed each of the five counts in the statement of claim and they are still further condensed in the appellant's case: para. 45. The two condensations practically agree.

(1) [1892] A. C. 26.

J. C. 1924 — THOMPSON v. BRITISH MEDICAL ASSOCIATION (N. S. W. BRANCH).

In the first count of the declaration the plaintiff alleges that the defendant association maliciously and unjustifiably conspired and combined with certain of its members whose names were unknown to him to do certain things. These things were (1.) to pass a resolution for his expulsion, (2.) to expel him, (3.) to induce, persuade and procure medical practitioners members of the association to refuse to meet him in consultation or to accord him professional recognition in any other form, (4.) to intimidate, coerce and unduly influence such practitioners into refusing to meet him in consultation or to accord him professional recognition in any other form, and (5.) to seriously prejudice the plaintiff and injure his practice. The count goes on to allege that each of these objects was carried out in pursuance of this conspiracy and combination, as a consequence of which the plaintiff suffered damage.

The second count avers, as a fact, that the plaintiff was expelled from the association, but does not set forth any unlawfulness or wrongdoing in the manner whereby this was brought about, and then proceeds to allege that the defendants "with undue influence wrongfully, maliciously and unjustifiably induced and procured large numbers of medical practitioners practising in this State members of the association (including certain names specially mentioned) to refuse to meet the plaintiff in consultation or to accord him professional recognition in any other form" whereby he suffered damage.

The plaintiff was compelled to deliver particulars of the causes of action set forth in each of these counts as follows: With regard to the intimidation, coercion and undue influence alleged to have been practised by the defendant association particulars were delivered to the defendants. Under the first count these were (1.) that the defendants "procured and induced certain other doctors practising in New South Wales to refuse to meet the plaintiff in consultation or to accord him professional recognition in any shape by the threat contained in the "intra-professional restrictions" regulations of the defendants, and that if they did so they would subject

themselves to the penalties laid down in the said regulations," (2.) "that the defendants threatened all doctors who met the plaintiff in consulation or accorded him professional recognition in any other form with expulsion or some other punishment if they acted in breach of the aforesaid regulation."

In the particulars delivered under the second count it is set out that "the unlawful threats, intimidation and coercion and undue influence charged are the threats, intimidation and coercion exercised by the intra-professional restrictions regulations."

No evidence was adduced at the trial of the actual making of any such last-mentioned threats, so that the case under the first count, so far as it claims damages for the alleged intimidation, coercion and undue influence, rests solely upon what is spoken of in No. 1 of the particulars as "the threat contained in the intra-professional restrictions regulations of the defendants."

The appellant's case apparently is and indeed it was so urged before their Lordships that because upon the expulsion of Dr. Thompson the intra-professional restrictions regulations may textually apply to him, though they were framed before he ever became a member, are not specifically directed to him, and have never in any way been, by the association, put into operation or enforced against him, their very existence amounts to proof of intimidation, coercion, etc., and to undue influence and unlawful threats exercised and made by the association, by which they procured medical practitioners, whether members of the association or not, to refuse to meet the appellant in consultation, or to accord to him professional recognition. This reasoning, having regard to what has already been pointed out in reference to these regulations, is, in their Lordships' view, thoroughly fallacious. They decline to act upon it.

In the third count the publication of a libel on the appellant is complained of, consisting of the circulation of the resolution of the committee of the association recommending the appellant's expulsion.

J. C. 1924 THOMPSON v. BRITISH MEDICAL ASSOCIATION (N. S. W. BRANCH).

In the fourth count the publication complained of is the resolution of the general meeting confirming the resolution of the committee touching the appellant's expulsion.

And the fifth count complains of slander published at the general meeting by the announcement of the result of the vote of expulsion. In addition to the claim of 5000*l.* damages, the plaintiff claims an injunction to restrain the association from expelling the plaintiff and depriving him of his right of property as member, and from using unlawful threats and intimidation and other unlawful means to induce the members of the association not to hold consultation with the plaintiff or give him professional recognition.

The defendants on August 11, 1922, filed a plea of not guilty. This plea, according to the practice of the Supreme Court, puts in issue all the matters which would have been put in issue under the Common Law Procedure Act by the same plea. The application for an injunction was never ruled upon. It was at the termination of the trial adjourned by James J., the trial judge, to a day to be fixed, which up to the present day has never been fixed.

At the trial it was not suggested, much less proved, that the council of the association which investigated the complaint or charge against the appellant was not properly constituted, and therefore not competent legally to deal with the complaint by reason of some of the members of the council being so interested or prejudiced or so hostile to the appellant as to make it neither just, right nor legal that they should take part in an investigation, which was in itself of a judicial or quasi-judicial character. Similar observations apply to the general meeting which confirmed the resolution of the council.

The whole case before the Court at the trial was conducted on the assumption that these two bodies had jurisdiction to investigate, in the manner prescribed by the rules, the charge made against the appellant and to resolve to expel him.

The "intimidation" in the first and second counts of the statement of claim mentioned was sought to be proved by the assumed fact that the expulsion being valid, necessarily

subjected the appellant to the operation of the intra-professional restrictions.

Their Lordships cannot possibly hold that the mere existence of these restrictions necessarily amounted to proof of the "intimidation" complained of, and this is, of course, clear that an expulsion held to be invalid could not subject the appellant to the operation of these restrictions, and therefore that there could not, in such a case, be any "intimidation." It was with some hardihood resolutely contended on behalf of the appellant that however gross, shameful or inhuman the conduct of a member of the association in his practice might be, such, for instance, as if he, while drunk, should attend a woman in the pains of childbirth, he could not be expelled from the association by reason of the existence of this restriction. Their Lordships do not at all agree that these restrictions would necessarily bring about such a disastrous result as that. In their view it is clear that if the association in such a case expelled the delinquent solely with the intent, and for the purpose of, in the interest of the association, relieving it of the disgrace of such a man's membership, it could validly do so.

The argument urged on behalf of the appellant on this point leaves one, however, in a somewhat puzzled state of mind. Its drift and meaning must be that the expulsion of the appellant was invalid at law. If so, it was a nullity, and could be disregarded, and an injunction restraining them from expelling him would be his proper remedy, but at the trial many of the grievances of which the appellant complained were based upon the validity of the expulsion. If the council which passed the resolution expelling the appellant was validly constituted, as it is apparently admitted to have been, it must be admitted that the appellant's acts and conduct furnished ample evidence upon which such a body acting honestly, justly and reasonably might come to the conclusion at which it arrived. The appellant was consulted by a Mrs. Farr, alleged to have been suffering for many years from a malady called "folie circulaire," or recurrent insanity. He thought she was at the time of her interview fully sane,

J. C. 1924 — THOMPSON v. BRITISH MEDICAL ASSOCIATION (N. S. W. BRANCH). —

though she was still under control. He only saw her on two occasions—namely, October 6 and 7, 1920. He thought that the treatment and control to which she was subjected as an insane person was unjust, illegal and improper. The lady told him that she was under the care of Dr. Davidson, an eminent alienist, who lives in Sydney and is a member of the defendant association. The appellant communicated with Dr. Davidson by telephone stating something of what Mrs. Farr had told him and asked for a consultation. Dr. Davidson offered to inform him of the facts of Mrs. Farr's case. The appellant asked for an undertaking from Dr. Davidson that Mrs. Farr should not be taken away to any asylum in the meanwhile. Dr. Davidson refused to give this undertaking, and the lady was in fact removed next day to St. Margaret's Asylum. The appellant immediately started a public agitation on the subject of this lady's treatment. In that he might have been quite right. What he had not a right to do, but what in fact he did, was to make, by insinuation, the grossest charges against his brother professionals connected with the treatment of lunatics, and the control of lunatic asylums.

The learned Chief Justice delivering the unanimous judgment of the Supreme Court en banc describes these accusations thus: "Serious imputations had been cast by the plaintiff publicly upon the conduct of members of the medical profession in regard to their treatment of a mental patient founded upon statements of that patient herself, which, if proved, would amply warrant their own expulsion from the association and their condemnation by any right-thinking man." Their Lordships quite concur in opinion with the learned Chief Justice as to the nature and effect of these representations. The appellant in the notice of particulars served on his behalf deliberately states that these charges, which he had to admit he made, were frivolous in their nature. Their Lordships think, on the contrary, they were grossly calumnious charges.

The excuse the appellant gave for his action was that he was irritated by an article published in a paper named

the Medical Gazette, in very condemnatory terms. This paper was no doubt recognized as the official organ of the association. But there was not a particle of legal evidence to show that it was owned or conducted by the association, or that the latter body was any party to, or in any way responsible for, the writing or publication of this article. There was direct evidence to the contrary. Its columns were open to the association or its members, but only for the expression of their views on subjects of interest to the medical profession.

On August 9, 1921, the publication in the public press of the charges hereinbefore mentioned made by the appellant was, according to the established practice, brought before, and considered by, the ethics committee of the association. A resolution was there passed that a special meeting of the council should be called on August 16, 1921, for the consideration of the appellant's expulsion. This meeting was adjourned till September 27, 1921, for which date a special meeting of the council was called.

The notice convening the meeting ran thus: "Notice is hereby given you that a special meeting of the council of the New South Wales Branch of the British Medical Association will be held at the rooms of the association, Number 30–34, Elizabeth Street, Sydney, on Tuesday, September 27, 1921, at 8.15 P.M., when the subjoined resolution will be proposed for the consideration of the council in pursuance of art. 34 of the articles of association: "RESOLUTION. That members of the council of the New South Wales Branch of the British Medical Association here assembled resolve that Dr. G. S. Thompson has been guilty of conduct derogatory to the honour and integrity of the medical profession in this State and calculated to bring the same into public contempt and injurious to the welfare and interests of this branch and that accordingly he be expelled from this branch of the association."

On August 16, 1921, a notice was given to the members of the association that this meeting was about to be held, together with a long and full enumeration and description

J. C. 1924 THOMPSON v. BRITISH MEDICAL ASSOCIATION (N. S. W. BRANCH).

of the offences and conduct which the appellant would be called upon to explain.

The general meeting of the association, which had been duly convened, was held on November 18, 1921, when the resolution passed by the council on September 27, 1921, in the terms stated above, was affirmed.

The appellant was present at both meetings and was afforded the fullest opportunity of defending himself, and treated with great indulgence and consideration.

On November 25, 1921, a circular was sent by the secretary of the association to the members containing (inter alia) the following passages: "At the extraordinary meeting of the branch, held November 18, 1921, the following resolution passed by the council, September 27, 1921, was confirmed—namely," and the resolution was then set out.

In their Lordships' view if any body rightly convened and properly composed is burdened with the discharge of some judicial or quasi-judicial duty affecting the rights, liberties or properties of a subject, makes, as the result of a just and authorized form of procedure, a decision it has jurisdiction to make, that decision if legal evidence be given in the course of the proceeding adequate to sustain it, cannot in the absence of some fundamental error be impeached or set aside, save upon the ground that this body was interested, or biased by corruption or otherwise, or influenced by malice in deciding as it did decide. This of course does not apply to appeals, or to cases where the finding of a jury is set aside as against the weight of evidence. In the present case there is not a shred of evidence of any of these things. There is no legal evidence to show that both the council and the general meeting did not consider and decide the matter of the appellant's expulsion honestly and fairly, uninfluenced by either fear or favour.

Indeed the only evidence adduced at the trial to show that the members of the association or any of them were in the course they took actuated by interest or bias or hostile feelings towards the appellant was the following. The appellant swore that Dr. Todd, the secretary of the association

in a conversation he had with the appellant, told the latter "that the profession had got their knife into him (the appellant) for the action he (the appellant) took in Chidley's case." It is to be observed that it is the entire profession, not merely the association or any of its members in particular who, according to the appellant, were said to have got the knife into him. Dr. Todd was examined as a witness at the trial. He was asked in cross-examination if he had ever made to the appellant this statement, and his answer was that he had no recollection of ever having done so. The jury were, however, at liberty to accept the appellant's evidence, and their verdict shows that they did accept it. But it is obvious that the statement, made behind the backs of the members of the association, was no evidence against them or any of them, no proof of the existence among them or any of them of hostile feelings towards the appellant or of a desire to injure him, because no proof was given that the secretary was the authorized agent of the association or any of its members to make a communication such as this on their behalf. It would be little less than childish to suppose that the enmity of an employer against a particular individual can be established simply by proving that the employer's agent or servant stated behind his employer's back that the latter entertained those feelings, without showing that the servant or agent had express or implied authority to speak on this matter on his employer's behalf. There is another matter, however, which their Lordships think they are bound to refer to. Dr. Davidson had some communications with the appellant. The appellant has made some allegations against him and insinuated that his conduct was rather unscrupulous. These matters are set forth in the eighth paragraph of his case. No evidence was given to sustain them. Dr. Davidson fortunately did not form one of the council which met on September 27, 1921, and passed the resolution that Dr. Thompson should be expelled. But he did form a member of the councils which met on the following dates, March 22, 1921, August 16, 1921, November 8, 1921, and also the meeting of the ethical council held on

J. C. 1924 — THOMPSON v. BRITISH MEDICAL ASSOCIATION (N. S. W. BRANCH).

October 11, 1921. The consideration of the conduct of Dr. Thompson and the propriety of his expulsion and of the procedure to be adopted on the investigation of his alleged misconduct were, at each of these meetings, more or less under consideration and discussion.

The councils were on each of these occasions acting in this matter of Dr. Thompson's possible expulsion in a judicial or quasi-judicial character. Action of that character should be above suspicion. A person having such duties to discharge disqualifies himself from performing them, vitiates the composition of the body of which he forms part, and renders their decision illegal and void, if he has a pecuniary interest in the decision he is about to give, or is biased to such an extent as to render him other than an impartial judge: *Leeson* v. *General Council of Medical Education.* (1)

No doubt no legal evidence was produced at the trial of this case to show that Dr. Davidson had such a pecuniary interest in any decision he might be called upon to make, or was biased to such an extent as to make him other than an impartial judge or disqualify him from acting on those councils he attended; but his relations with Dr. Thompson were such, and the insinuations the latter made against him were so grave, that a suspicion might well arise, though unfounded and unjust, that he was prejudiced against the appellant. It is because of the possibility of the existence of such a suspicion that their Lordships cannot refrain from expressing their great regret that Dr. Davidson did not disconnect himself with every branch of, and step in, the proceedings between the association and the appellant touching the latter's alleged misconduct or consequent expulsion. It is quite possible that Dr. Davidson acted as he did not from any improper motive or with any improper object, but from mere thoughtlessness. But in their Lordships' view persons called upon to discharge judicial or quasi-judicial duties can never have it too often impressed upon them how undesirable it is that they should attempt to discharge those duties under conditions which throw

(1) (1889) 43 Ch. D. 366, 384.

suspicion, however undeservedly, on their motives and action.

It only remains to consider the two counts framed for libel and one for slander, Nos. 3, 4 and 5. Particulars of these causes of action have been delivered by the appellant.

The libel relied on in the third count is alleged to consist of the circular dated November 5, 1921, sent out by the defendant association, containing the terms of the resolution passed by the council.

This was the notice convening the general meeting of the association to consider whether, as required by art. 34, the resolution of the council should or should not be confirmed. It sets out what that resolution was, and naturally and properly it informs the members that the business to be transacted by the general meeting was to determine whether or not this resolution should be so confirmed. There is nothing in this notice of the nature of an accusation against the appellant, nor is there any averment that the statements touching his conduct mentioned in the resolutions or any one of them are or is true. The fourth count bases appellant's cause of action on a circular alleged to have been sent out by the association, not only to its own members, but to branches of the Medical Association in all the Australian States. The answer to this last statement is that at the trial no evidence was produced to prove that any circular or statement as to the fact of expulsion of the appellant was ever communicated to any one, by the secretary of the association or by any one acting on its behalf, to any person or persons other than its members. To these latter persons a circular was sent by the secretary in the terms already stated.

The slander complained of in count No. 5 consists, according to the particulars of the announcement made at the meeting of the council of November 18, 1921, of the carrying of the resolution. In the particulars the appellant states he does not know the officer who made the announcement or the words of the announcement or the names of

J. C. 1924 THOMPSON v. BRITISH MEDICAL ASSOCIATION (N. S. W. BRANCH).

the members present. The respondents did not give any evidence supporting this count at the trial. It is possible that the result of the poll was announced at this meeting, or the statement made that the resolution proposed was carried. No definite and specific evidence was given to establish the cause of action relied upon. It is quite obvious, however, that the publications relied on in these three counts were made on privileged occasions. The association had obviously an interest and a moral, if not legal, duty to communicate to its members the information that the resolution to expel the appellant had been carried, and the members had a corresponding interest in receiving the information. The same principle applies to the communications to members mentioned in the fourth count. No evidence was given of any communications having been made to persons other than members.

On September 27 the appellant appeared at the meeting convened for that day. The president read over to him the notice convening the meeting and the charges preferred against him. He, the appellant, desired to have a personal friend of his, a Mr. Parkinson, with him and also a stenographer. This request was ultimately complied with. The appeal was fully heard. He spoke, he admitted, for about an hour, and ultimately the above-mentioned resolution was passed by a majority of 15 to 1. The general meeting was duly convened by notice under art. 34 for the purpose of considering the resolution passed by the council. The appellant was again fully heard and the resolution of the council was confirmed. Everything was done formally and in due course according to the provisions of the articles of association and of the rules and orders of the association. The appellant relies upon the count in slander, as if the allegations in it were proved, which they were not. That being so, in their Lordships' view the presumption of implied malice is rebutted, and no legal evidence was given during the course of the trial sufficient to prove that the respondents were actuated by express malice in the publication of any of the matters in these three counts mentioned.

Their Lordships are of opinion that the appeal fails on every ground and must be dismissed, and that the appellant must pay the costs, and they will humbly advise His Majesty accordingly.

J. C. 1924 THOMPSON v. BRITISH MEDICAL ASSOCIATION (N. S. W. BRANCH).

Solicitors for appellant: *Light & Fulton.*
Solicitors for respondents: *Thomas Cooper & Co.*

[PRIVY COUNCIL.]

LOCH AND ANOTHER . . . . . APPELLANTS;

AND

JOHN BLACKWOOD, LIMITED . . . RESPONDENTS.

J. C.* 1924 *June* 2.

ON APPEAL FROM THE WEST INDIAN COURT OF APPEAL.

Company—Winding Up—"Just and equitable"—Ejusdem generis Rule—Discretion of the Court—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69, *Imp.*), *s.* 129 (*vi.*)—*Companies Act,* 1910 (*No.* 10 *of* 1910, *Barbados*), *s.* 127 (*vi.*).

The Companies Act, 1910, of Barbados, provides by s. 127, which is identical with s. 129 of the Companies (Consolidation) Act, 1908, that "a company may be wound up by the Court . . . . (vi.) if the Court is of opinion that it is just and equitable that the company should be wound up."

A company was registered in Barbados under the Companies Act, 1910, as a public company, in order to carry on the testator's business and to divide the profits of it between members of his family entitled under his will to share them; the managing director had a preponderating voting power. Upon a petition for winding up by shareholders who were not directors, it appeared that the directors had omitted to hold general meetings, or to submit accounts, or recommend a dividend, and that they had laid themselves open to the suspicion that their object in so omitting was to keep the petitioners in ignorance of the company's position and affairs and to acquire the petitioners' shares at an under value:—

Held, that the power to wind up the company under s. 127 (vi.) was not confined to cases in which there were grounds analogous to those mentioned earlier in the section; and that in the circumstances of the case, regard being had to the domestic character of the company,

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* *Present:* LORD SHAW, LORD PHILLIMORE, and LORD CARSON.

J. C.
1924
LOCH
v.
JOHN BLACKWOOD, LD.

the petitioners were entitled under that provision to a winding up order.

Authorities as to the effect of the Companies (Consolidation) Act, 1908, s. 129 (vi.), reviewed.

Judgment of the Court of Appeal reversed.

APPEAL (No. 100 of 1923) from an order of the West Indian Court of Appeal (Barbados) dated March 15, 1923, reversing an order of the Court of Common Pleas of Barbados.

In 1922 the appellants petitioned the Court of Common Pleas of Barbados praying for (inter alia) an order that the respondent company be wound up by the Court under the Companies Act, 1910, of Barbados.

The facts appear fully from the judgment of the Judicial Committee.

The Chief Justice of Barbados (Sir W. H. Greaves) was of opinion that it was just and equitable that the company should be wound up, and under s. 127 (vi.) of the Act he made a winding-up order.

Upon appeal to the West Indian Court of Appeal the order was set aside. The learned judges were of opinion that to justify the Court in ordering a company to be wound up under s. 127 (vi.) of the Act it must be shown either that the company's business cannot be carried on at all, or that on account of fraud or for other weighty reasons it ought not to be allowed to be carried on, neither of which grounds for a winding-up order existed in the present case.

1924. *Wilton K.C.* and *Blanco White* for the appellants referred to the Companies Act, 1910, of Barbados, s. 127; the Companies (Consolidation) Act, 1908, s. 129; *Symington* v. *Symington's Quarries* (1); *In re Newbridge Sanitary Steam Laundry* (2); *In re Yenidje Tobacco Co.* (3); *Baird* v. *Lees* (4); *Demerara Bauxite Co.* v. *Hubbard* (5); and Lindley on Partnership, 8th ed., p. 656.

Clauson K.C. and *Gordon-Brown* for the respondents

(1) (1905) 8 F. 121.
(2) [1917] 1 I. R. 67.
(3) [1916] 2 Ch. 426.
(4) 1924 S. C. 83.
(5) [1923] A. C. 673.

contended that on the facts the appellants were not entitled to a winding-up order; they referred to *Percival* v. *Wright* (1) and to s. 63 of the (Barbados) Companies Act, 1910.

June 2. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from an order dated March 15, 1923, of the West Indian Court of Appeal presided over by Sir A. Lucie Smith, Chief Justice of Trinidad, the other members of the Court being Sir Charles Major, Chief Justice of British Guiana, and Mr. W. P. Michelin, Acting Chief Justice of the Leeward Islands. This Court reversed an order dated October 30, 1922, of His Honour Sir W. H. Greaves, Chief Justice of Barbados, sitting in the Court of Common Pleas for Barbados, for the winding up of the respondent company, John Blackwood, Ld.

The appellants are petitioners for an order by the Court for the winding up. The petition is presented under s. 127 of the Barbados Companies Act, 1910. That section is in terms identical with those of s. 129 of the English Companies (Consolidation) Act, 1908. The sub-section particularly founded upon is sub-s. 6, which declares that a company may be wound up by the Court "if the Court is of opinion that it is just and equitable that the company should be wound up."

A good many years ago Mr. John Blackwood established an engineering business in Barbados and carried it on until his death in January, 1904. Under the provisions of his will his estate fell to be divided one-half to Mrs. Rebecca Thomson McLaren, the wife of Mr. William McLaren, and one-quarter each to his niece Mrs. Loch and to his nephew (Mrs. Loch's brother) James Blackwood Rodger lately deceased; the shares to be paid to Mrs. Loch and Mr. Rodger when they reached the age of 30.

Authority was given to his trustees to convert his business into a company, with powers to his trustees to act as directors and to Mr. McLaren to have the supreme control and

(1) [1902] 2 Ch. 421.

J. C. 1924 LOCH v. JOHN BLACKWOOD, LD.

management of matters connected with the business. The trustees were James Murphy (who died in 1911 and never acted in the trusts); Mr. William McLaren (the testator's sister's husband); and Mr. McLaren's clerk Henry Allan Yearwood.

A company was accordingly formed on January 2, 1905. In the year 1916 Mrs. Loch and James Blackwood Rodger had both attained the age of 30. The latter died in December, 1919. The board of directors now consists of Mr. McLaren, his wife Mrs. McLaren, who was appointed in 1913, and Mr. Yearwood. Under this directorate the business of the company appears to have been energetically managed and to have amassed considerable profits.

The arrangement of the capital was this: the total amount was 40,000 in 1*l.* shares; 20,000 of these were allotted to Mrs. McLaren; of the remaining 20,000, 10,000 should have gone to Mrs. Loch and 10,000 to Mr. Rodger. Mrs. Loch, however, was allotted 9999; Mr. Rodger, 9998; and the three shares left over were allotted one to Mr. McLaren and one each to Mr. Yearwood and Mr. King (Mrs. McLaren's nominees; the first being Mr. McLaren's clerk and the second his solicitor). This was quite a natural and proper arrangement; but, of course, in the event of a division of opinion in the family between what may be called the McLaren interest on the one hand, and the interest of the nephew and niece on the other, the preponderance of voting power lay with the former. It is thus seen that although taking the form of a public company the concern was practically a domestic and family concern. This consideration is important, as also is the preponderance of voting power just alluded to.

In the petition for winding up eight different reasons are assigned therefor. The first is: that the statutory conditions as to general meetings have not been observed; the second that balance sheets, profit and loss accounts and reports have not been submitted in terms of the articles of the company; and the third is that the conditions under the statute and articles as to audit have not been complied with.

All these allegations are true, and it seems naturally to follow from the preponderance already alluded to, that there is at least considerable force in the fifth reason that it is impossible for the petitioners to obtain any relief by calling a general meeting of the company. There are further submissions—namely, that the company and the managing director, Mr. McLaren, have refused to submit the value of the shares to arbitration, and that without winding up it is impossible for the petitioners to realize the true value of their shares. But the principal ground of the petitioner is that in the circumstances to be laid before the Court it is just and equitable that the company should be ordered to be wound up. This last ground was affirmed by the Court of Common Pleas.

With regard to the first three submissions made in the petition, it was strenuously argued on behalf of the company, which practically means the directorate or the McLaren interest, that however true it might be that owing to the informal way in which the books of the company had been kept it appeared as if both the statute and the articles of association had been violated in various particulars and that no general meetings of the company had been held, and no auditors properly appointed, and it was certain that no balance sheets, profit and loss accounts and reports had been submitted for the critical years 1919 and 1920, still these were no grounds for winding up. Other applications, it was said, might competently be made to the Court to compel the statute and articles to be properly complied with. It may be doubtful whether such a course of conduct lasting in several particulars since its inception until now, would be insufficient as a ground for winding the company up. But their Lordships think it unnecessary to give any separate decision upon such a point.

In their opinion, however, elements of that character in the history of the company, together with the fact that a calling of a meeting of shareholders would lead admittedly to failure and be unavailable as a remedy, cannot be excluded from the point of view of the Court in a consideration of the

J. C. 1924 LOCH v. JOHN BLACKWOOD, LD.

justice and equity of pronouncing an order for winding up. Such a consideration, in their Lordships' view, ought to proceed upon a sound induction of all the facts of the case, and should not exclude, but should include circumstances which bear upon the problem of continuing or stopping courses of conduct which substantially impair those rights and protections to which shareholders, both under statute and contract, are entitled. It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

The judgment of the Court below appears to have proceeded upon the view that this statutory prescription for winding up under the sixth sub-section—namely, when the Court is of opinion that it is just and equitable that this should be done—is restricted to cases ejusdem generis with those enumerated in the other sub-ss. 1–5 of s. 127 of the Barbados Companies Act.

The Board, having fully considered the authorities, the judgments and the arguments, are of opinion that this is not the law. The alleged principle of restriction, as applicable to enumerated causes for the winding up of companies, may be said to have taken its origin in a sentence used in the judgment of Cottenham L.C. in *Ex parte Spackman*. (1) The sentence is: "This clause was, no doubt, thus worded in order to include all cases not before mentioned; but of course it cannot mean that it should be interpreted otherwise

(1) (1849) 1 Mac. & G. 170, 174.

than in reference to matters ejusdem generis, as those in the previous clauses." (1) But it is apt to be forgotten that the very next sentence is: "There must be something in the management and conduct of the company which shows the Court that it should be no longer allowed to continue, and that the concern ought to be wound up." Whether these two sentences could stand together may be a question, but it is quite plain that the first ought not to be read alone without the second: and if the second be taken in the ordinary and natural meaning of the words used, it may be left to the speculator to conjecture whether there is anything in the application to this section of the Companies Act of the ejusdem generis doctrine considered restrictively. Lord Cottenham's words are quoted somewhat guardedly by Lord Cairns in *In re Suburban Hotel Co.* (2), and his definite proposition is as follows: "But what I am prepared to hold is this, that this Court, and the winding-up process of the Court, cannot be used, and ought not to be used, as the means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation."

The cases set forth in sub-ss. 1 – 5 separately are: (1.) if the company has by special resolution resolved that the company be wound up by the Court; (2.) if default is made in filing the statutory report or in holding the statutory meeting; (3.) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; (4.) if the number of members is reduced below five; and (5.) if the company is unable to pay its debts. It seems plain enough that beyond these cases there is the whole category of fraudulent administration under which a company's property might be imperilled or transferred into the pockets of its directors, when the case for winding up would be of supreme urgency. Yet if

(1) The relevant enactment was the Joint Stock Companies Winding-up Act, 1848, s. 5, sub-s. 8, the language of which differs only slightly from that of s. 129, sub-s. 6, of the Companies (Consolidation) Act, 1908.—A. M. T.

(2) (1867) L. R. 2 Ch. 737, 750, 751.

J. C. 1924 LOCH v. JOHN BLACKWOOD, LD.

the argument as to ejusdem generis were sound, it would logically exclude such a case from the grounds for winding up, which is absurd. It has been long stated that the element of fraud could not be so dealt with.

The cases need not be further referred to in detail; but in the opinion of the Board it is in accordance with the laws of England, of Scotland and of Ireland that the ejusdem generis doctrine (as supposed to have been laid by Lord Cottenham) does not operate so as to confine the cases of winding up to those strictly analogous to the instances of the first five sub-sections of s. 129 of the British Act. It so happens, however, that, in several instances, there have occurred circumstances analogous to those of the present in regard to the two other points noted above—namely, the domestic nature of the company and the permanent preponderance of voting power. And accordingly one or two of such cases may be cited.

In *In re Amalgamated Syndicate* (1) Vaughan Williams J. (afterwards L.J.) put the matter thus: "Mr. Buckley, at p. 245 of the 7th edition of Buckley on the Companies Acts, says: 'So where a company is proceeding to do something which is ultra vires, a shareholder has a right in an action, on behalf of himself and all other shareholders, to restrain the company, though every shareholder but himself be acquiescent; but has no right to come for a winding-up order under the "just and equitable" clause'; and he cites *Ex parte Fox* (2) as an authority. But it is plain that the passage is a mere illustration of a previous passage on the same page, in which he says: 'There is no doubt that the "just and equitable" clause gives the Court power to wind up a company in cases not coming under any of the first four heads [of s. 79], but there must be a strong ground for exercising the power, at any rate at the instance of a shareholder.' Without going into details, I repeat what I said during the argument, that the stringency of the ejusdem generis rule has been considerably relaxed of late." Circumstances analogous to those of the present case occurred

(1) [1897] 2 Ch. 600, 606, 607. (2) (1871) L. R. 6 Ch. 176.

with regard to the composition of a company which was private: see *In re Yanidje Tobacco Co.* (1), and the Master of the Rolls, Lord Cozens-Hardy, in expressing the opinion that the company should not be allowed to continue, said: "I have treated it as a partnership, and under the Partnership Act of course the application for a dissolution would take the form of an action; but this is not a partnership strictly, it is not a case in which it can be dissolved by action. But ought not precisely the same principles to apply to a case like this where in substance it is a partnership in the form or the guise of a private company? . . . . I think that in a case like this we are bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause and to wind up the company." The board specially refers to the accurate and careful opinion of Warrington L.J. in that case.

In *In re Blériot Manufacturing Aircraft Co.* (2) Neville J. made an order for winding up on the ground that the substratum of the company was gone and upon a further ground of proved misconduct by the directors. His observations upon the latter point are apt in the present case: "But there is another ground. Here the company has considerable capital, and it is alleged that there is misconduct by the directors. It is truly said by Mr. Russell that the mere fact of misconduct is no ground for winding up. The words 'just and equitable' are words of the widest significance and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances. . . . . I think the moneys of the company have been misapplied, and that the company is so constituted that it is deprived of its usual remedies. This is again sufficient for a winding up."

A passage was read from Lord Halsbury's Laws of England, vol. v., p. 397, the authorship of which was acknowledged to be that of the late Master of the Rolls,

(1) [1916] 2 Ch. 426, 431. (2) (1916) 32 Times L. R. 253, 255.

J. C. 1924 LOCH v. JOHN BLACKWOOD, LD.

Lord Swinfen. It is as follows: "The words as to its being 'just and equitable' to wind up are not to be read as being ejusdem generis with the preceding words of the enactment." It may be doubtful if the references to the authorities there given are all precisely in point, but as to the view of the law there expressed, their Lordships agree with it.

This view of the law is fully accepted in Ireland; their Lordships refer to the judgment and the analysis of the authorities in *In re Newbridge Sanitary Steam Laundry* (1) by the Lord Chancellor.

In Scotland the point has been most carefully canvassed in two leading cases in company law. One is *Symington* v. *Symington's Quarries* (2); their Lordships think it not inexpedient to quote the following passages from that eminent judge and commentator Lord M'Laren. It expresses, in their view, the correct principle of interpretation: "I apprehend that the true rule for determining whether general words are to be confined to things ejusdem generis is this, that if the general words are bound up with the enumeration by proper words of relation, then their meaning is confined to the subject-matter indicated in the enumeration, but if the general words are severed from the enumeration of particulars there is no logical reason for interpreting the one by the other. . . . . In this Act of Parliament the general words have reference to the discretion and judgment of the Court. The case put is, 'Whenever the Court shall be of opinion that it is just and equitable that the company should be wound up.' That introduces a different order of ideas altogether from the conditions which precede, because these are not conditions referred to the judgment of the Court, but are defined in the Act itself, and the function of the Court is only to say whether the facts of the case come within one or other of the categories. I have made these observations because, while I find in the English decisions that not much weight is now attached to the ejusdem generis rule of construction for this clause, yet I think it desirable, at least

(1) [1917] 1 I. R. 67. (2) 8 F. 121, 129, 130.

for my own satisfaction, to see upon what grounds the true construction can be maintained and defended." As applying aptly to the circumstances of the present case, the following further sentences may be cited: "But then this is not a company that is formed by appeal to the public. It is what, for want of a better name, I may call a domestic company. The only real partners are the three brothers of a family, the other shareholders having only a nominal interest for the purpose of complying with the provisions of the Act. In such a case it is quite obvious that all the reasons that apply to the dissolution of private companies, on the grounds of incompatibility between the views or methods of the partners, would be applicable in terms to the division amongst the shareholders of this company, and I agree with your Lordship that this is a case in which it would be just and equitable that this company should be wound up, and the partners allowed to take out their money and trade separately if they please."

The present Lord President of the Court of Session (Lord Clyde) in *Baird* v. *Lees* (1) discusses the section and the ejusdem generis doctrine in exactly the same spirit. His words are as follows: "I have no intention of attempting a definition of the circumstances which amount to a 'just and equitable' cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders,

(1) 1924 S. C. 83, 92.

J. C. 1924 LOCH v. JOHN BLACKWOOD, LD.

they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company."

It only remains to apply the doctrines thus expressed to the circumstances of the present case. Their Lordships forgo unnecessary details. They are of opinion that the learned Greaves C.J. is correct when he says that: "The directors in control since the death of Blackwood Rodger have, I think, laid themselves open to the suspicion that by omitting to hold general meetings, submit accounts and recommend a dividend, their object was to keep the petitioners in ignorance of the truth and acquire their shares at an under value."

The Board agrees with these views. In the opinion which they have formed, Mr. McLaren, for reasons not unnatural, had come to be of opinion that the business owed much of its value and prosperity to himself. But he appears to have proceeded to the further stage of feeling that in these circumstances he could manage the business as if it were his own. Had Mrs. Loch and Mr. Rodger, or after his death Mr. Rodger's executor, obtained a dividend which year by year represented in any reasonable measure a just declaration out of the undoubted profits of the concern, they might no doubt have been content to allow this state of matters to go on; but although on one or two occasions Mr. McLaren paid trifling and fragmentary sums to Mrs. Loch, neither she nor the Rodger family have ever obtained any dividend at all. And it is not to be wondered at that in the transaction now about to be mentioned they completely lost confidence in Mr. McLaren, and had only too great justification for doing so.

It appears that Mr. McLaren viewed with the highest disrelish the testamentary arrangements made by Mr. J. B. Rodger, who died in December, 1919, and he expresses his opinion upon that subject in a somewhat extraordinary letter of February 24, 1920, going so far as to suggest that another and prior will of Mr. Rodger ought

to be substituted for his last will. It is difficult to understand what he conceived this had to do with the management of the business, or the distribution of profits therein. But it is certain that Mr. McLaren then proceeded with much urgency and vigour to attempt to acquire the shares of Mrs. Loch and of Mr. Rodger's executor for himself, thereby consolidating the entire concern in himself and his wife.

The substantial fact which their Lordships think to be proved is that in 1920 the assets of that business, apart from any allowance for goodwill, very substantially exceeded the 40,000*l.* of the company's nominal capital. A skilled accountant called in after the proceedings commenced placed the amount somewhere about 80,000*l.*: but it is sufficient to take the facts simply as their Lordships have just put them.

This most satisfactory state of the company's finances was fully realized by Mr. and Mrs. McLaren.

Upon May 1, 1920, Mr. McLaren, Mr. Yearwood and Mrs. McLaren, at a directors' meeting, agreed: "That the financial position of the firm was such that the directors unanimously agreed that they could with every confidence partly discharge the chairman's deferred salary; to meet this it was agreed that the 12,500*l.* 5 per cent. War Loan be transferred to his name and become his property absolutely including the six months' interest now due. . . . . It was further agreed that the chairman's salary be increased from 1100*l.* to 2000*l.* per annum from January 1, 1920." It may be noted that the company's own minutes form the most important evidence in the case, and that, owing probably to the view of the statute taken as already mentioned, they are not referred to in the judgment in the Court of Appeal.

No notice was given to the respondents, as shareholders, of this piece of business being contemplated, and no notice was given of what had been done. Four days after this extraordinary transaction, Mr. McLaren wrote to Mrs. Loch's husband a letter dated May 5, 1920, proposing to her that 10,000*l.* should be given by him as the cumulative value of

J. C. 1924 LOCH v. JOHN BLACKWOOD, LD.

Mrs. Loch's shares and Mr. J. B. Rodger's executor's shares. These shares in all amounted to one-half of the capital of the company—namely, 20,000*l.*—and, as already mentioned, it is evident that the true value of assets much exceeded this amount. The proposal was to buy Mrs. Loch and the Rodger family out for 10,000*l.* But a further suggestion, which in some way seems to have been mixed up with the umbrage felt by Mr. McLaren in regard to the contents of Mr. Rodger's will, was made, and that was that Mrs. Loch should be a participant in a scheme whereby the 10,000*l.* to be paid should be distributed—8000*l.* to herself and only 2000*l.* to the Rodger family.

Their Lordships do not desire to characterize these suggestions in the language which perhaps they fully deserve. The Rodger family, entitled to one-fourth of the holding in the company, nominally 10,000*l.*, but in reality of a much higher value, were to be bought off for 2000*l.*, and Mrs. Loch was to be the agent in this scheme. No confidence in the directorate could survive such a proposal. To crown all this, as was afterwards discovered, the 10,000*l.* could be comfortably paid by Mr. McLaren out of the 12,500*l.* which, four days before, he and his wife and clerk had voted to himself out of the funds of the company. Their Lordships express no surprise at the instant repudiation of Mr. McLaren's proposals by Mrs. Loch—a repudiation which is creditable to her—and at the application for a winding up of the company being made. Upon the principles already set forth in this judgment that application must succeed. The broad ground is that confidence in its management was, and is, and that most justifiably, at an end. A further narrative of the facts is unnecessary, although some of them are grave.

It must, however, be said in justice to Mr. McLaren that after the parties were at arm's length the 12,500*l.* was refunded and the minute rescinded. Further, being advised that the increase of salary from 1100*l.* to 2000*l.* was wrong he abandoned the same from February, 1922, and at their Lordships' Bar, he being present, an assurance was given

that the two years' increase already drawn—namely 1800*l.*—would forthwith be paid to the company.

Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs, and the order of Court of Common Pleas of Barbados restored with costs in both Courts below.

J. C. 1924 LOCH v. JOHN BLACKWOOD, LD.

Solicitor for appellants: *E. Leslie Harris.*
Solicitor for respondent: *T. L. Weir.*

Followed. KAHAN *v.* PAKISTAN FEDERATION [1951] 2 K. B. 1003

[HOUSE OF LORDS.]

DUFF DEVELOPMENT COMPANY, LIMITED . . . . . } APPELLANTS;

AND

GOVERNMENT OF KELANTAN AND ANOTHER . . . . . } RESPONDENTS.

H. L. (E.)* 1924 *April* 10.

Considered. SULTAN OF JOHORE *v.* ABU-BAKAR [1952] A.C. 318

Foreign State—Sovereignty—Letter of Secretary of State as to Status—Whether Conclusive—Immunity from legal Process—Waiver of Sovereignty—Submission to Jurisdiction—Arbitration—Enforcing Award—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 1, 11, 12.

It is the settled practice of the Court to take judicial notice of the status of any foreign Government, and for that purpose, in any case of uncertainty, to seek information from a Secretary of State; and the information so received is conclusive.

A Government recognized as sovereign by His Majesty's Government is not the less exempt from the jurisdiction of our Courts because it has agreed to restrictions on the exercise of its sovereign rights.

By a deed dated in July, 1912, the Government of Kelantan granted to the appellant company certain mining and other rights to be exercised in that State, and the deed contained an arbitration clause, which incorporated the Arbitration Act, 1889, so far as applicable. Disputes having arisen as to the effect of this deed, they were referred to an arbitrator, who made an award in favour of the company and directed the Government to pay the costs of the arbitration. In December, 1921, the Government applied to the Chancery Division, under s. 11 of the Arbitration Act, to set aside the award, but the application was refused. In June, 1922, the company obtained from the King's Bench Division, under s. 12 of the Act, an order giving leave to enforce the award, but

* *Present:* VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER, and LORD CARSON.

H. L. (E.)
1924
DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT.

this order was set aside, on the application of the Government, on the ground that Kelantan was a sovereign independent State. Before setting aside this order the Master asked the Secretary of State for the Colonies for information as to the status of Kelantan, and received in reply an official letter stating that Kelantan was an independent State and its Sultan the sovereign ruler thereof, and that the King did not exercise or claim any rights of sovereignty over Kelantan, and enclosing an agreement regulating the relations between the Sultan and the King. By this agreement the Sultan agreed to have no political relations with any foreign power except through the medium of the King, and in all matters of administration (other than those touching the Mohammedan religion and Malay custom) to follow the advice of an adviser appointed by the King:—

Held, (1.) that the statement in the letter as to the sovereignty of Kelantan and its rulers was not intended to be qualified by the terms of the agreement, and that the letter was conclusive; (2.) (by Viscount Cave, Viscount Finlay, Lord Dunedin, and Lord Sumner; Lord Carson dissenting) that the Government of Kelantan had not submitted to the jurisdiction of the Court for the purpose of the proceedings to enforce the award, either by assenting to the arbitration clause or by applying to the Court to set aside the award.

Mighell v. *Sultan of Johore* [1894] 1 Q. B. 149 applied.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal (Lord Sterndale M.R., Warrington and Younger L.JJ.) reversing an order of Roche J.

The following statement is taken from the opinion of Viscount Cave:—

"On July 15, 1912, the respondents, the Government of Kelantan (acting by the Crown Agents for the Colonies), entered into an agreement under seal with the appellants, the Duff Development Co., Ld., whereby the Government of Kelantan granted to the company certain rights of mining, timber cutting and road making and other rights to be exercised in that State. The deed contained an arbitration clause, which incorporated the Arbitration Act, 1889. Disputes having arisen as to the meaning and effect of the deed, the disputes were referred in accordance with the provisions of the arbitration clause to an arbitrator, who, on November 17, 1921, made an award whereby he made certain declarations in favour of the company and directed an inquiry as to damages and directed the Government of Kelantan to pay the costs of the arbitration and award. On

December 22, 1921, the Government moved the Chancery Division of the High Court of Justice in England, under s. 11 of the Arbitration Act, 1889, to set aside the award on the ground of error in law appearing on the face of it; but this application was on March 23, 1922, dismissed with costs, a decision which was afterwards affirmed by the Court of Appeal and by this House. (1) On June 12, 1922, the company applied to the King's Bench Division of the High Court by originating summons under s. 12 of the Arbitration Act for leave to enforce the award, and an order to that effect was made by Master Bonner. On July 7, 1922, Master Ball, on the application of the company, made a garnishee order whereby certain moneys said to be owing to the Government of Kelantan from the Crown Agents for the Colonies were attached for payment of the taxed costs of the arbitration. On December 12, 1922, Master Jelf made an order, whereby he set aside the order made by Master Bonner and all proceedings under it, including the garnishee order made by Master Ball, and stayed all further proceedings in the matter on the ground that the Sultan of Kelantan was an independent sovereign ruler and the State of Kelantan was an independent sovereign State, and that the Court had no jurisdiction over the Sultan or the Government of Kelantan. An appeal against the order of Master Jelf was allowed by Roche J.; but on an appeal to the Court of Appeal that Court reversed the decision of Roche J., and restored the order of Master Jelf. Hence the present appeal."

Before making the order of December 12, 1922, Master Jelf wrote to the Secretary of State for the Colonies requesting information as to the status of the Government of Kelantan, and received in reply a letter sent by direction of the Secretary of State and dated October 9, 1922.

The letter enclosed an agreement dated October 22, 1910, regulating the relations between the King and the Sultan. The letter is set out and the effect of the agreement is stated in the opinion of Viscount Cave, and both are summarized in the headnote.

(1) [1923] A. C. 395.

H. L. (E.) 1924 DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT.

1924. February 12, 14, 15, 18. *Maugham K.C.* and *Hon. Stafford Cripps* for the appellants. The sovereignty of the State of Kelantan is not an independent sovereignty. The distinguishing mark of an independent sovereign power is that it has reserved to itself the right to manage its own internal affairs, but by the terms of the agreement regulating the relations between Great Britain and Kelantan the King of England has the right to appoint a resident official to tell the Sultan of Kelantan how he is to manage the internal affairs of his country. That is wholly inconsistent with the idea of an independent sovereignty as that term is understood by jurists of repute: Klüber, Droit des Gens Moderne de l'Europe, §§ 21, 22, 24, 33; Vattel, Le Droit des Gens (Pradier-Fodéré edition. Paris, 1863), Tome 1, p. 123; Calvo, Le Droit International (1870 ed.), Livre II., § 31; Calvo, Dictionnaire de Droit International Public et Privé (1885 ed.), Tome 2, p. 225, tit. "Souverain"; Wheaton's International Law (5th English ed.), p. 50; Halleck's International Law (3rd ed.), vol. i., pp. 65, 69. The letter of the Colonial Office is not conclusive on this point. The question whether a State is an independent sovereign power for the purpose of claiming immunity from process in this country is a question of law, and it is the province not of the Government but of the Courts to determine all questions of law: *Prohibitions del Roy.* (1) If the letter had merely contained a declaration of the recognition of the State of Kelantan by Great Britain no exception could have been taken to it, as recognition is a question of fact, but the declaration that Kelantan is an independent State is an unwarrantable attempt by the Secretary of State to deprive the Courts of this country of their right to determine questions of law: *Walker* v. *Baird* (2); *The Charkieh.* (3) The proper course was for the Colonial Office to furnish the Court with the necessary documents and to leave it to decide the question of independence. Further, the letter is ambiguous. Notwithstanding the declaration as to the independence of

(1) (1607) 12 Rep. 63-65. (2) [1892] A. C. 491, 496-7.
(3) (1873) L. R. 4 A. & E. 59.

Kelantan, when the letter is read in conjunction with the documents enclosed in it, it shows that the State of Kelantan is not independent. The letter cannot be read as an Act of State, but is merely a letter written to assist the Courts of this country. This is, in effect, an appeal from *Mighell* v. *Sultan of Johore* (1), which is opposed to the appellants' contention as to the conclusiveness of a document supplied by a Secretary of State for the information of the Court. That case, unless distinguishable, was wrongly decided and should be overruled. In the earlier case of *Taylor* v. *Barclay* (2) information furnished by the Foreign Office was accepted by the Court, but that information related to the question of recognition, which is a question of fact. In *Emperor of Austria* v. *Day and Kossuth* (3) it was admitted that the plaintiff had been recognized by Queen Victoria as de facto Emperor of Austria and King of Hungary. *Mighell* v. *Sultan of Johore* (1) has been followed by Farwell J. in *Foster* v. *Globe Venture Syndicate*. (4) In *The Gagara* (5) and *The Annette* (6) the Government supplied information which enabled the Court to form its own conclusion.

[They also referred on this point to *Yrisarri* v. *Clement*. (7)]

Assuming that the Sultan of Kelantan is an independent sovereign, he has waived his sovereignty and submitted to the jurisdiction of the Courts of this country; first, by agreeing to refer matters in dispute between the parties to arbitration on the terms of the Arbitration Act, 1889, in accordance with the arbitration clause in the deed of July 15, 1912, and by assenting to the appointment of the arbitrator thereunder and taking part in the arbitration without raising his privilege, and, secondly, by applying to the Court under s. 11 of the Arbitration Act to have the award set aside and pursuing that application up to the House of Lords. If a foreign sovereign sues or is sued without objection he is treated as recognizing the competency of the

(1) [1894] 1 Q. B. 149.
(2) (1828) 2 Sim. 213, 220.
(3) (1861) 3 D. F. & J. 217, 233.
(4) [1900] 1 Ch. 811.
(5) [1919] P. 95.
(6) [1919] P. 105.
(7) (1825) 2 C. & P. 223; (1826) 3 Bing. 432.

H. L. (E.) 1924 DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT.

Court and stands on the same footing as an ordinary suitor; and if judgment is obtained against him it can be enforced, subject to certain exceptions appertaining to the property of a sovereign, in the same way as if he were a subject. It is anomalous that a sovereign who invokes the jurisdiction of the Court under s. 11 of the Arbitration Act for the purpose of setting aside an award should set up his sovereignty when the award comes to be enforced against him under s. 12 of that Act. Further, a foreign sovereign who by the reference to arbitration on the terms of the Act agrees to submit to the jurisdiction of the Court will be held to his promise. The appellants are therefore entitled to an order that the award shall be enforced in the same manner as a judgment or order.

[Upon this part of the case they referred to Blackstone, Book I., c. 7; Dicey's Conflict of Laws, 3rd ed., p. 235; *King of Spain* v. *Hullet and Widder* (1); *The Parlement Belge* (2); *Vavasseur* v. *Krupp* (3); *The Newbattle.* (4)]

Sir Thomas Inskip K.C. (with him *Giveen*) for the Attorney-General, who had obtained leave to intervene. The Colonial Office has sent forth no uncertain sound, and if it has informed the Court that the State of Kelantan is a sovereign State that is conclusive. The form of letter in this case was taken from *Mighell* v. *Sultan of Johore* (5) (which is the nearest case to the present), and was adopted in *Carr* v. *Fracis Times & Co.* (6) and in *Luther* v. *Sagor.* (7) The status of foreign States is decided by the Courts of law, but hitherto the Courts have always taken judicial notice of statements of the Secretaries of State as expressing His Majesty's view: *Jones* v. *Garcia del Rio* (8); *Thompson* v. *Powles* (9); *Taylor* v. *Barclay.* (10) Where you have the elements of sovereignty stated and admitted by the Government it does not much matter whether the Government says that the State is a sovereign State or that the King has recognized

(1) (1833) 1 Cl. & F. 333.
(2) (1880) 5 P. D. 197, 214.
(3) (1878) 9 Ch. D. 351.
(4) (1885) 10 P. D. 33, 35.
(5) [1894] 1 Q. B. 149.
(6) [1902] A. C. 176, 184.
(7) [1921] 3 K. B. 532, 536, 549, 556.
(8) (1823) T. & R. 297.
(9) (1828) 2 Sim. 194, 212.
(10) 2 Sim. 213, 220.

the State as a sovereign State. This letter amounts to a recognition. Independence is a deceptive test. As between the King and another State it is for His Majesty to say whether he will treat that State as a sovereign State, as is illustrated by the States of Borneo and Sarawak : see Anson's Law and Custom of the Constitution, 3rd ed., vol. ii., p. 92. Sovereignty is not inconsistent with considerable restrictions on the freedom of the State to administer its own affairs : Vattel (English ed., 1834), Book I., c. 1, § 4. Assuming that the letter is ambiguous (which is denied) the proper course was to apply to the Colonial Office for further information, but the letter is in accordance with precedent.

Upjohn K.C. (with him *W. E. Vernon*) for the respondents. The question whether the Sultan is a sovereign ruler is not determined by the question of independence. Whenever in a civil suit the status of a foreign ruler alleged to be sovereign has come into question, according to the practice which has prevailed for more than a century, the Court does not allow the parties to embark upon an argument on the question of status, but takes judicial notice of that matter, and where the Court is not in a position of its own knowledge to pronounce an opinion on the point it is the custom of the Court to seek information from one of the Secretaries of State as representing the Crown. The proper mode of informing the Court as to the status of a foreign State is by letter by a Secretary of State. In one or two cases the parties have themselves applied for information to the Secretary of State, but have stated that the information was wanted for the use and assistance of the Court. In the face of the statement that the King does not exercise or claim any rights of sovereignty over Kelantan it is impossible to say that this letter is ambiguous. Some dependence on the protecting power is not inconsistent with sovereignty : Grotius de Jure Belli ac Pacis (Whewell's ed.), vol. ii., Book II., c. 15, vii., 3 ; Vattel (1834 ed.), Book I., c. 1, §§ 4, 5, 6 ; Calvo, Le Droit International, Tome 1, Livre II., § 31 ; Wheaton (5th English ed.), p. 51 ; Halleck, 3rd ed., p. 67. The question of dependence is purely a question of fact to be derived from

H. L. (E.) 1924 DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT.

the language of the documents and the practice which has been followed thereunder. As to submission: a foreign sovereign who sues or submits to the jurisdiction of the Court thereby gives the Court the jus dicendi, but does not authorize the issue of execution against him. *The Newbattle* (1) is a decision that the Court will not seize the property of a sovereign on an interlocutory proceeding in a case where, if the litigation had been between ordinary subjects, the property would have been seized as a matter of course. That was a case of arrestment before judgment, but it is submitted that that makes no difference. In no case has it been held that the property of the sovereign is liable to be subjected to execution. The authorities fall under three heads, and establish, first, that the sovereign must make discovery: *King of Spain* v. *Hullet and Widder* (2); *Rothschild* v. *Queen of Portugal* (3); secondly, that a sovereign plaintiff must submit to have a counterclaim made against him: *The Newbattle* (1); *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* (4); and see Dicey's Conflict of Laws, 3rd ed., p. 221; and, thirdly, that an order for security for costs may be obtained against a sovereign plaintiff: *The Newbattle* (1); *Republic of Costa Rica* v. *Erlanger*. (5) But they go no further. The law on this point is summarized in Westlake's Private International Law, 6th ed., § 192. A mere submission to the jurisdiction by a sovereign either as plaintiff or defendant is a submission to procedure for the purpose of enabling the Court to decide a right and no more. There is a difference between proceedings down to judgment and proceedings by way of execution to enforce a judgment, in that the former proceedings are not inconsistent with sovereignty and the latter are. A submission by a sovereign must be very closely scrutinized to see how far it extends. A submission to arbitration on the terms of the Arbitration Act in the case of a sovereign must not be so construed

(1) 10 P. D. 33.
(2) 1 Cl. & F. 333.
(3) (1839) 3 Y. & C. (Ex.) 594.
(4) [1897] 2 Ch. 487, 492; [1898] 1 Ch. 190, 194.
(5) (1876) 3 Ch. D. 62.

as to involve any derogation from his sovereign rights. It is a submission to the domestic tribunal only. The words "so far as applicable" in the arbitration clause mean so far as applicable, having regard to the fact that one of the parties is a sovereign power. Those words save the situation and prevent this from being a plain unambiguous waiver of sovereignty such as is necessary to enable the Court to issue execution and subject to seizure the property of the sovereign within the jurisdiction. Further, the submission must be at the time when the Court is asked to exercise jurisdiction over the sovereign and not at any previous time. It must be in the face of the Court, and there has been no such submission: *Mighell* v. *Sultan of Johore*. (1) Nor can the application by the Sultan to set aside the award be treated as involving a submission to the jurisdiction of the Court to enforce the award against him by levying execution on his property. If he was dissatisfied with the award no other procedure was open to him.

[He also referred to *In re Boks & Co. and Peters, Rushton & Co.* (2) and *Strousberg* v. *Republic of Costa Rica*. (3)

Maugham K.C. replied.

The House took time for consideration.

April 10, 1924. VISCOUNT CAVE [after stating the facts]. My Lords, on the hearing of the appeal before your Lordships two points were argued on behalf of the appellant company.

First, it was argued that the Government of Kelantan was not an independent sovereign State, so as to be entitled by international law to the immunity against legal process which was defined in *The Parlement Belge*. (4) It has for some time been the practice of our Courts, when such a question is raised, to take judicial notice of the sovereignty of a State, and for that purpose (in any case of uncertainty) to seek information from a Secretary of State; and when information is so obtained the Court does not permit it to

(1) [1894] 1 Q. B. 149, 159, 160–1, 163.
(2) [1919] 1 K. B. 491.
(3) (1880) 29 W. R. 125; 44 L. T. 199.
(4) 5 P. D. 197.

H. L. (E.) 1924 DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT. Viscount Cave.

be questioned by the parties. Information of this character was obtained from a Secretary of State and accepted without question in *Taylor* v. *Barclay* (1) and *Mighell* v. *Sultan of Johore* (2); and those cases were followed in *Foster* v. *Globe Venture Syndicate* (3) and in *The Gagara*. (4) In the present case the requisite inquiry was addressed by Master Jelf (while the summons to enforce the award was pending before him) to the Secretary of State for the Colonies, and in answer to this inquiry the Under Secretary replied as follows:—

"Downing Street,
"9th October, 1922.

"SIR,

"With reference to your letter of the 31st July, I am directed by Mr. Secretary Churchill to inform you, in reply to your letter of the 18th July, that Kelantan is an independent State in the Malay Peninsula and that His Highness the Sultan Ismail bin Almerhum Sultan Mohammed IV. is the present Sovereign Ruler thereof.

"2. Prior to the year 1909 the relations between Siam and Kelantan were regulated by an agreement signed in 1902 a copy of the English text of which is enclosed. Such rights as the King of Siam possessed over Kelantan were transferred to His Majesty the King by a treaty signed at Bangkok on the 10th of March 1909. A copy of this treaty is enclosed.

"3. Not all the rights possessed by the King of Siam were ever exercised by His Britannic Majesty and the present relations between His Majesty the King and the Sultan of Kelantan which are those of friendship and protection are regulated by an agreement signed on the 22nd of October 1910. A copy of this agreement is enclosed. His Majesty the King does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan.

"4. I am to explain that in 1910 the Rajah of Kelantan with His Majesty's approval assumed the title of Sultan and is now Sultan and Sovereign of the State of Kelantan.

(1) 2 Sim. 213.
(2) [1894] 1 Q. B. 149.
(3) [1900] 1 Ch. 811.
(4) [1919] P. 95.

" 5. The Sultan in Council makes laws for the Government of the State, and His Highness dispenses justice through regularly instituted Courts of Justice, confers titles of honour and generally speaking exercises without question the usual attributes of Sovereignty.

" I am,
" Sir,
" Your most obedient servant,
" (Signed) J. MASTERTON SMITH.

" Master Jelf,
" Supreme Court."

The documents enclosed in this reply show that Kelantan had formerly been recognized as a dependency of Siam; that the Siamese Government had by the Treaty of Bangkok transferred to the British Government all its rights over Kelantan; and that by the agreement dated October 22, 1910, referred to in the letter from the Secretary of State, the Rajah (afterwards styled the Sultan) of Kelantan had engaged to have no political relations with any foreign power except through the medium of His Majesty the King of England and to follow in all matters of administration (save those touching the Mohammedan religion and Malay custom) the advice of an adviser appointed by His Majesty. Upon these documents it was argued on behalf of the appellants that, although the Secretary of State had stated in the letter of October 9, 1922, that Kelantan was an independent State and its Sultan a sovereign ruler, this statement must be held to be qualified by the terms of the documents enclosed with the letter; that, taking the information as a whole, the true result was that Kelantan was not an independent but a dependent State; and accordingly that the Sultan was not immune from process in the English Courts.

My Lords, in my opinion this argument cannot prevail. Vattel (Droit des Gens, ed. Pradier-Fodéré (1863), vol. i., ch. 1) defines a sovereign State as a nation which governs itself by its own authority and laws without dependence on any foreign power (s. 4); but he also lays it down (s. 5) that a State may without ceasing to be a sovereign State be bound

H. L. (E.) 1924 — DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT. — Viscount Cave.

to another more powerful state by an unequal alliance, and he adds :—

" Les conditions de ces alliances inégales peuvent varier à l'infini. Mais quelles qu'elles soient, pourvu que l'allié inférieur se réserve la souveraineté ou le droit de se gouverner par lui-même, il doit être regardé comme un État indépendant, qui commerce avec les autres sous l'autorité du droit des gens.

" Par conséquent un État faible qui, pour sa sûreté, se met sous la protection d'un plus puissant et s'engage, en reconnaissance, à plusieurs devoirs équivalents à cette protection, sans toutefois se dépouiller de son gouvernment et de sa souveraineté, cet État, dis-je, ne cesse point pour cela de figurer parmi les souverains qui ne reconnaissent d'autre loi que le droit des gens."

No doubt the engagements entered into by a State may be of such a character as to limit and qualify, or even to destroy, the attributes of sovereignty and independence: Wheaton, 5th ed., p. 50; Halleck, 4th ed., p. 73; and the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises it is desirable that it should be determined, not by the Courts, which must decide on legal principles only, but by the Government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or non-recognition by the British Government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as sovereign in our Courts. In the present case the reply of the Secretary of State shows clearly that notwithstanding the engagements entered into by the Sultan of Kelantan with the British Government that Government continues to recognize the Sultan as a sovereign and independent ruler, and that His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country. If after this definite statement a different view were taken by a British Court, an undesirable conflict might arise; and, in my opinion, it is the duty of the Court to accept the statement of the Secretary

of State thus clearly and positively made as conclusive upon the point.

But secondly it is argued on behalf of the appellant company that, assuming the Sultan of Kelantan to be a sovereign ruler, he has waived his sovereignty and submitted to the jurisdiction of the High Court—and that in two ways—namely, first by assenting to the arbitration clause in the deed of 1912, and secondly by applying to the Court to set aside the award of the arbitrator.

Then has the respondent by agreeing to the arbitration clause in the deed of 1912 submitted to the jurisdiction so far as regards an application to the Court to enforce the award? The arbitration clause provides that "this shall be deemed a submission to arbitration within the Arbitration Act 1889 or any statutory modification or re-enactment thereof for the time being in force, the provisions whereof shall apply so far as applicable." I think the effect of this provision is to incorporate in the deed the relevant provisions of the Arbitration Act, including the power given by the Act to either party on having an award made in his favour to make an application to the Court under s. 12 of the Act for leave to enforce the award, and the words "so far as applicable" do not appear to me to qualify that right. If so, then the Sultan has in effect agreed to submit to the jurisdiction so far as to entitle the appellants to apply to the Court for leave to enforce an award against him and on leave being given to enforce it by the usual modes of execution; but the question remains whether this agreement to submit is equivalent to an actual submission. On full consideration I am not satisfied that it is. I do not forget the cases in which it has been held that a person not otherwise liable to the jurisdiction of a Court may make it a term of a contract that questions arising under it shall be decided by that Court, or those cases (such as *Montgomery* v. *Liebenthal* (1)) in which it has been held that a person outside the jurisdiction may agree that service of process upon a person within the jurisdiction shall be good

(1) [1898] 1 Q. B. 487.

H. L. (E.) 1924 — DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT. — Viscount Cave.

service upon himself. But in the case of a foreign sovereign something more than this is required. It was held in *Mighell* v. *Sultan of Johore* (1) that a submission by such a sovereign, to be effective, must take place when the jurisdiction is invoked and not earlier, and that when a question of jurisdiction is raised by him there can be no inquiry by the Court into his conduct or actions prior to that date; and I see no reason for doubting the correctness of that decision. If therefore a sovereign having agreed to submit to jurisdiction refuses to do so when the question arises, he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the Court.

There remains the question whether the Sultan by applying under s. 11 of the Act to set aside the award impliedly submitted to an application under s. 12 of the Act to enforce it. In my opinion, he did not. By his application under s. 11 he endeavoured to get rid of the award and left it to the Court to decide his rights in this respect; but the application for leave to enforce the award is a new proceeding, and though connected with the earlier application is distinct from it. In my opinion, therefore, this argument also fails.

Upon the above view of the case a question which was debated during the argument—namely, whether a foreign sovereign who submits to judgment thereby submits to execution under the judgment upon his property in this country—does not arise for decision; and accordingly I express no opinion upon that question.

For these reasons I am of opinion that this appeal fails and should as against the respondent Government be dismissed with costs, such costs to be set off against any sum which may be owing by the respondent Government to the appellants.

VISCOUNT FINLAY. My Lords, the appellants are a company formed for the purpose of working concessions in Kelantan. The respondents are described as "The Government of Kelantan." The appellants held certain rights and privileges in the State of Kelantan under an agreement made

(1) [1894] 1 Q. B. 149.

with them by the Rajah of that State in 1905. This agreement was cancelled by an indenture made on July 15, 1915, between the Crown Agents for the Colonies, acting for and on behalf of the Government of Kelantan, and the appellant company, and by the same indenture grants were made of certain lands and rights in Kelantan to the company. By the twenty-first clause of the indenture all disputes relating to it were to be referred to a sole arbitrator, and this clause was to be deemed a submission to arbitration under the Arbitration Act of 1889, the provisions of which were to apply as far as applicable.

In 1919 such disputes arose, and they were referred to Sir Edwin Speed, who made his award on November 17, 1921. The Government of Kelantan moved before Russell J., in the Chancery Division, to set aside the award on the ground of mistake in law; this motion was dismissed with costs on March 23, 1922, and Russell J.'s decision was affirmed in the Court of Appeal on May 24, 1922, and in the House of Lords on March 22, 1923. In these proceedings the Kelantan Government raised no objection on the ground of privilege as a sovereign State, but rested their case on such grounds as are open to any party to an arbitration. They had disputed their liability before the arbitrator and they challenged the award itself when made as invalid upon legal grounds.

Before the appeal to the House of Lords just referred to, the appellant company applied to Master Bonner for an order under s. 12 of the Arbitration Act, 1889, for leave to enforce the award in the same manner as a judgment or order. On this summons two questions arose, (1.) whether the Kelantan Government is a sovereign State, and (2.) whether, if the first question were answered in the affirmative, execution could be issued against it in the Courts of this country. The Government of Kelantan did not appear on the summons before Master Bonner, and on June 21, 1922, he made an order that the appellants be at liberty to enforce the award in the same manner as a judgment or order to the same effect.

The Government of Kelantan then applied on a summons

H. L. (E.) 1924 DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT. Viscount Finlay.

before Master Jelf for an order that the summons before Master Bonner, the alleged service of it on the Government and the order made thereon on June 21, should be set aside on the ground that the Government of Kelantan is that of a sovereign ruler. The hearing was adjourned in order that Master Jelf might communicate with the Colonial Office. The Colonial Office sent to Master Jelf a letter dated October 9, 1922, informing him that Kelantan is an independent State in the Malay Peninsula and that the Sultan is the sovereign ruler thereof. The letter also enclosed (1.) the English text of an agreement in 1902 conferring upon Siam certain rights over Kelantan; (2.) a treaty between Great Britain and Siam dated March 10, 1909, transferring these rights to His Majesty's Government; and (3.) an agreement between Great Britain and Kelantan dated October 22, 1910. This last agreement provided by art. 1 that Kelantan should have no relations with any foreign power except through the King of Great Britain; by art. 2 that His Majesty might appoint officers to advise the Rajah of Kelantan, and that the Rajah should follow their advice in all matters of administration other than those touching the Mohammedan religion and Malay custom, and by art. 3 that the Rajah of Kelantan should not enter into agreements concerning land, or grant or allow the transfer of any concession, in favour of any person other than a native of Kelantan, or appoint officials other than natives, without the consent of His Majesty's Government. There were also clauses providing for the raising of troops in Kelantan in certain events (art. 4); stipulations that internal administration should not be interfered with except in certain contingencies (art. 5); and provisions with reference to posts, telegraphs and railways (arts. 6 and 7). Art. 8 provided that nothing in the agreement should affect the administrative authority then held by the Rajah of Kelantan, and that except as provided in the agreement the relations between the Rajah and His Majesty's Government should be the same as those which had existed between the Rajah and the Siamese Government.

With the consent of His Majesty, the Rajah of Kelantan,

after the date of the last-mentioned agreement, assumed the title of Sultan of Kelantan, and is now so designated.

Master Jelf held that Kelantan is a sovereign State, and by his order dated December 12, 1922, set aside the order made by Master Bonner. Roche J. on appeal reversed the order of Master Jelf; he was, however, himself reversed by the Court of Appeal on January 17, 1923, so that the order of Master Jelf stands good subject to the present appeal. It is from this decision of January 17 that the present appeal is brought to this House.

The first question to be determined is as to the status of Kelantan—is the Sultan a sovereign prince?

It is settled law that it is for the Court to take judicial cognizance of the status of any foreign Government. If there can be any doubt on the matter the practice is for the Court to receive information from the appropriate department of His Majesty's Government, and the information so received is conclusive. The judgment of Farwell J. in *Foster* v. *Globe Venture Syndicate* (1) seems to me to be a perfectly accurate statement of the law and practice on this point. There are a great many matters of which the Court is bound to take judicial cognizance, and among them are all questions as to the status and boundaries of foreign powers. In all matters of which the Court takes judicial cognizance the Court may have recourse to any proper source of information. It has long been settled that on any question of the status of any foreign power the proper course is that the Court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the proper department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance.

The letter of the Colonial Office is not an expression of the opinion of the official who wrote it. The first sentence is: "I am directed by Mr. Secretary Churchill to inform you

(1) [1900] 1 Ch. 811.

H. L. (E.) 1924

DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT.

Viscount Finlay.

in reply to your letter of 18th July that Kelantan is an independent State in the Malay Peninsula and that His Highness Ismail" (etc.) "is the present sovereign ruler thereof." This is an official answer by the Secretary of State on behalf of the Government.

The question put was as to the status of the ruler of Kelantan. It is obvious that for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with sovereignty that the sovereign may in certain respects be dependent upon another Power; the control, for instance, of foreign affairs may be completely in the hands of a protecting Power, and there may be agreements or treaties which limit the powers of the sovereign even in internal affairs without entailing a loss of the position of a sovereign Power. In the present case it is obvious that the Sultan of Kelantan is to a great extent in the hands of His Majesty's Government. We were asked to say that it is for the Court and for this House in its judicial capacity to decide whether these restrictions were such that the Sultan had ceased to be a sovereign. We have no power to enter into any such inquiry. The reply of the Colonial Office to Master Jelf on October 9, 1922, states that Kelantan is an independent State in the Malay Peninsula and that the Sultan is the sovereign ruler, that His Majesty's Government does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan, and that the Sultan makes laws, dispenses justice through Courts, and, generally speaking, exercises without question the usual attributes of sovereignty.

In the face of this statement it is hopeless to contend that the Colonial Office, by appending to its letter the agreements with Siam and with Great Britain, referred it to the Courts to decide upon these documents whether the Sultan was sovereign or not. Such an interpretation is contrary to the plain terms of the letter. Of course, the Colonial Office might have given a bald answer that the Sultan is a sovereign, but it has been the practice when there are

agreements or treaties dealing with the powers of the alleged sovereign to append to the reply on the question of sovereignty copies of any documents. There are very good reasons for this practice. The department might lay itself open to serious misunderstanding if it took any other course. It might be said that there was a want of candour in merely stating the conclusion that the Power is a sovereign Power without disclosing any such limitations on the sovereignty as exist here. The contention that by appending these documents the Colonial Office remits the question to the Court to form its own opinion upon it is based on a misconception. When the letter and the documents are read together, it is clear that the Secretary of State says explicitly that the Sultan is a sovereign ruler, and the documents are appended by way of making it clear that their effect has been considered and that the Colonial Office has given all due weight to them in arriving at the conclusion that the Sultan is a sovereign prince. There is no ground for saying that because the question involves considerations of law these must be determined by the Courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or on law.

It is true that by the agreement of October 22, 1910, the Sultan is bound not to have relations with any foreign Power except through His Majesty the King, and to follow the advice given him by the advisers appointed by His Majesty "in all matters of administration, other than those touching the Mohammedan religion and Malay custom." But it would be idle to contend that sovereignty is destroyed by the fact that a protecting Power has charge of foreign relations, and as regards the internal affairs the exception from the obligation to be guided by the advisers appointed by His Majesty is a very large one, as it comprises all matters touching the religion and the customary law of the country. The restrictions on the grant of concessions and the employment of officials in art. 3, and the provisions as to posts, telegraphs and railways in arts. 6 and 7 are quite consistent with the sovereignty of the Sultan, and so are the restrictions

H. L. (E.) 1924

DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT.

Viscount Finlay.

on the grant of concessions for the construction of railways within the State (art. 7). Art. 5 is as follows :—

"His Majesty's Government undertake not to interfere with the internal administration of the State of Kelantan otherwise than as provided for in this agreement, so long as nothing is done in that State contrary to the treaty rights and obligations that His Majesty's Government have with foreign Governments, and so long as peace and order are maintained in the State of Kelantan, and it is governed for the benefit of its inhabitants with moderation, justice and humanity."

And art. 8 provides that "nothing in this agreement shall affect the administrative authority now held by the Rajah of Kelantan," and that except as provided in the agreement the relations between the Rajah and His Majesty's Government shall be the same as those which previously existed between him and the Siamese Government.

While there are extensive limitations upon its independence, the enclosed documents do not negative the view that there is quite enough independence left to support the claim to sovereignty. But, as I have said, the question is not for us at all; it has been determined for us by His Majesty's Government, which in such matters is the appropriate authority by whose opinion the Courts of His Majesty are bound to abide.

The second question in the case is whether the Government of Kelantan had made such a submission to the jurisdiction of the Courts here that execution can be issued upon the award against any property in this country of the Kelantan Government.

It was contended by the appellant company that there was such a submission in art. 21 of the indenture of July 15, 1912, which contains the contract between the appellant company and the Kelantan Government.

This article begins by providing for the reference of any disputes under the contract to a sole arbitrator, and then proceeds: "And this shall be deemed a submission to arbitration within the Arbitration Act, 1889, or any statutory

modification or re-enactment thereof for the time being in force the provisions whereof shall apply as far as applicable."

One of the provisions of this Act is s. 12 :—

"An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect."

We are asked by the appellant company to say that this clause is a submission to the jurisdiction of the Court to order execution to issue upon the award against the property of the Government of Kelantan.

To appreciate this question it is necessary to refer to the history of our law with regard to the enforcement of awards.

Apart from statute the award of an arbitrator on a reference by agreement could be enforced only by action. When this was the state of the law it could not have been contended that a reference by agreement to arbitration with a foreign Government even if made in England would involve any obligation on the part of the foreign Government to submit to the jurisdiction of the English Courts in an action to enforce the award. When such an action was brought it would be at the option of the foreign Government to appear or not, as it pleased. There would certainly be no obligation upon it to accept the jurisdiction and to submit to judgment and execution against any property belonging to it in England. There is nothing in an agreement for settlement by arbitration to import a waiver of the right of a sovereign Power to refuse the jurisdiction of the English Courts in an action upon the award.

As time went on more summary remedies were given in addition to the remedy by action. In 1698 it was provided that the parties might agree that the submission should be made a rule of Court and that the Court might make it a rule of Court accordingly, and that any party disobeying the award should be liable to all penalties for contemning a rule of Court: 9 Will. 3, s. 15, s. 1. This proceeding, it will be observed, required the consent of the parties.

The Common Law Procedure Act, 1854, s. 17, went a step further, and provided that any agreement in writing for a

H. L. (E.) 1924 — DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT. — Viscount Finlay.

reference might be made a rule of Court unless the agreement provided to the contrary. It seems clear that this provision could not be put in force against a foreign Government without its consent.

The Judgments Act, 1838 (1 & 2 Vict. c. 110, s. 18), provides that all rules of Court for the payment of money should have the effect of judgments. This enactment still remains in force, but the sections of the Act of William III. and of the Common Law Procedure Act, 1854, above referred to, were repealed by the Arbitration Act, 1889, which by s. 12 provides, as already stated, that an award on submission may by leave of the Court or a judge be enforced in the same manner as a judgment or Order to the same effect.

In considering the effect of this s. 12 of the Arbitration Act it is material to observe that in the case of all the previous enactments for the same purpose the party against whom the rule was applied for would have the opportunity of opposing it, and it is clear that no such rule would have been made as against a sovereign State unless it had entered into an agreement submitting to the jurisdiction. The procedure by rule was merely an alternative procedure for the procedure by action, and the foreign State would have the same right of asserting its immunity as if the old remedy by action on the agreement had been resorted to.

Sect. 12 of the Arbitration Act of 1889 involved merely a change of procedure. The award may under it, by leave of the Court, be enforced as if it were a judgment. Application must be made to the Court for leave, and it appears to me that on such an application, if the other party to the award is a sovereign State, that party might assert its immunity from process and that the Court would be bound to refuse leave unless the objection had been waived.

Art. 21 in the indenture of July 15, 1912, on which the appellants rely as incorporating s. 12 of the Arbitration Act, cannot have the effect suggested. Sect. 12 can be made operative only by leave of the Court. I fail to see how art. 21 can possibly be read as an agreement by the Government

of Kelantan to consent to an Order for such leave being made. The leave of the Court being necessary before the award can be enforced as if it were a judgment, if a sovereign State claimed its immunity this would be a good reason for refusing the leave. The assertion that the agreement for the application of the provisions of the Arbitration Act involves a waiver of the right to object to execution on the ground of sovereignty involves reading s. 12 of the statute of 1889 as if it conferred a right to have execution on the award. The only right conferred is a right to apply for leave to issue execution on the award, and this leave will be granted only in suitable cases. It is not a suitable case if a foreign Government is concerned, unless there has been a clear waiver by that Government of its sovereign rights for this purpose. To the arbitration the Government of Kelantan had no objection; they attended the proceedings throughout. It was only when it was proposed to take a step which involved the right to execution against the Government that there was any occasion to raise the objection of sovereignty.

The present case differs fundamentally from the case of an action in which a foreign Government has appeared and has had judgment given against it. It is not necessary to decide that case for the purpose of the present appeal; here the only consent was to arbitrate.

The application to set aside the award was based entirely on the allegation that the arbitrator had gone wrong on a point of law and that this appeared on the face of the award. The award in that case might be set aside. I cannot see how we can construe such an application as involving an admission that if it failed the Government property might be taken in execution. The Kelantan Government had opposed the claim made in the arbitration throughout. Their motion was made to get rid of the award as vitiated by a wrong view of the law. The Government were quite entitled to get rid of an award the making of which they had opposed, and the motion to set it aside was solely on the ground that the award was inherently bad.

On this part of the case very many authorities were

H. L. (E.) 1924 DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT. Viscount Finlay.

cited. I do not consider it necessary to refer to them. The question is a very short one: Have the Kelantan Government waived objection to execution upon their property in this country? It is beyond question that Kelantan as a sovereign State is entitled to immunity from execution against the property of the Sultan, unless there has been a waiver.

I concur with the judgment delivered by the Master of the Rolls in this case, and think that he took the proper course in deciding the substantial question which had been litigated and in refusing to amend the application in the nebulous fashion suggested.

I am of opinion that this appeal should be dismissed with costs, but I think that the appellants should be allowed a set-off in respect of any costs due to them in respect of the other proceedings relating to the award which have not been paid.

LORD DUNEDIN. My Lords, I concur. On the first point I have little to add to what has been said by my noble and learned friend on the Woolsack. It seems to me that once you trace the doctrine for the freedom of a foreign sovereign from interference by the Courts of other nations to comity, you necessarily concede that the home sovereign has in him the only power and right of recognition. If our sovereign recognizes and expresses the recognition through the mouth of his minister that another person is a sovereign, how could it be right for the Courts of our own sovereign to proceed upon an examination of that person's supposed attributes to examine his claim and, refusing that claim, to deny to him the comity which their own sovereign had conceded? The second point is whether the Sultan has in this case submitted to the jurisdiction. It is true that the learned judges of the Court of Appeal based their judgment on the judgment they had pronounced the day before in the garnishee action, and in that action they had held that the Sultan's property could not be taken in execution of costs awarded against

him in the action where he had submitted to the jurisdiction by appearing as a plaintiff to seek to have the award set aside. My Lords, I wish most emphatically to state that I could not be held to approve of that part of the judgment in the garnishee case or the headnote in the case of the *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* (1), which I consider wrong and misleading. But the question as to the power of execution for costs so awarded is not raised by the present action, and it is therefore probably better that no considered opinion should be given on that subject. The only question to my mind is whether the Sultan submitted to the jurisdiction by entering into the agreement to refer or by appearing in the reference. The present action does not embrace the Chancery costs. It seeks to enforce the award as a judgment. The Sultan does not in this action waive the privilege of sovereignty. He can therefore only be subjected to the jurisdiction if either he has done so by appearing as plaintiff in the Chancery suit or by his subscription of the contract. Now, so far as the suit is concerned, I do not think this proceeding is a proceeding which could have founded a cross-action or counter-action to the suit. The same argument as prevailed in the *South African Republic Case* (1) prevails here. Then, as regards arbitration. An arbitrator is not a Court, and therefore by appearing before the arbitrator he did not submit himself to the jurisdiction of the Courts. (It may be interesting to note that under the Roman law appearance before an arbiter did not give rise to reconvention : see a very learned judgment of Inglis L.J.-C., in *Thompson* v. *Whitehead.* (2)) True it is that the Sultan contracted to allow the jurisdiction to be exercised against him, but he did so out of Court, and now he has changed his mind. He has broken his contract, but the Court has no jurisdiction to enforce any performance of it. It seems to me to say that by agreeing to submit he did submit is to argue in a circle.

I therefore agree that the present action fails and that the appeal should be dismissed.

(1) [1898] 1 Ch. 190. (2) (1862) 24 D. 331.

H. L. (E.) 1924 — DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT.

LORD SUMNER. My Lords, I should not trouble your Lordships at any length with my reasons for thinking that this appeal fails, if it were not for the novelty of this important subject in your Lordships' House.

The principle is well settled, that a foreign sovereign is not liable to be impleaded in the municipal Courts of this country, but is subject to their jurisdiction only when he submits to it, whether by invoking it as a plaintiff or by appearing as a defendant without objection. For present purposes it is not necessary to examine the particular theory of law on which this principle is rested. The practice is also well settled that the Court may and generally should make its own inquiry of the competent Secretary of State in order to ascertain, in case of need, whether a particular State is a sovereign State, or a particular person is the head, hereditary or elected, of such a State.

Your Lordships were frankly told at the Bar that this case is virtually an appeal against *Mighell* v. *Sultan of Johore* (1), in which that practice was approved. The questions there put to the Colonial Office by direction of the Court were not simply answered Aye or No, but were answered affirmatively with the addition of details explaining the Treaty relations of Johore with Her Majesty Queen Victoria. In *The Charkieh* (2) a similar question was put to the Foreign Office with regard to the Khediviate of Egypt and was answered in the negative in the terms " the Khedive has not been and is not now recognized by Her Majesty as reigning sovereign of the State of Egypt." In *The Annette* (3) the reply was that His Majesty was provisionally co-operating with the new Government, in opposition to the Soviet Government, but had not yet formally recognized it as the Government of a sovereign independent State. In *The Gagara* (4) the statement by the Foreign Office was that Esthonia was recognized as a sovereign State, but provisionally. Thus in one case a clear answer was given that there had been no recognition; in another that the State

(1) [1894] 1 Q. B. 149.
(2) L. R. 4 A. & E. 59, 86.
(3) [1919] P. 105.
(4) [1919] P. 95.

was sovereign and was so recognized, but with further information as to the Crown's Treaty relations with it; in the third that common action had taken place but without recognition of sovereignty; in the fourth that there was only provisional recognition, but still the State had been recognized as sovereign. Two are cases of States of some antiquity; two are cases of Governments of recent and troublous origin. The same procedure was, however, followed in them all.

Certain expressions used by Brett M.R. and Kay L.J. in giving judgment in the *Sultan of Johore's Case* (1) appear to suggest that the reason why the answer of the Colonial Office ought to be accepted without further discussion, is, that in effect it is something which the Crown deigns to declare to its Courts of law, and therefore it cannot be criticized or supplemented, since that would be disrespectful to the Crown itself. That this view of the meaning of the Court of Appeal has had its effect is shown by the language used by Farwell J. in *Foster* v. *Globe Venture Syndicate.* (2) The appellants, however, desire to go a little behind the form observed. They not unreasonably say: "An official of the Colonial Office advises the Sultan to go to arbitration, and the same official of the Colonial Office, or some other, advises him to dispute the award, and then the Colonial Office, in the name of the Crown, says that the Sultan is a sovereign and so is bound to nothing, not even to pay for what the Colonial Office has advised him to do. What then is the statement that the Sultan is a sovereign? Is it the voice of the sovereign of this country or is it in reality nothing but the contention of some one in the Colonial Office?"

Without contesting in the least either the inconvenience or the impropriety of any conflict between the High Court and the Secretary of State upon the grave question of the sovereignty of the Sultan of Kelantan, I venture to think that the mere obligation of deference to any statement made in His Majesty's name hardly constitutes the whole legal basis for the rule laid down in the *Johore Case.* (1)

The status of foreign communities and the identity of

(1) [1894] 1 Q. B. 149. (2) [1900] 1 Ch. 811.

H. L. (E.) 1924 DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT. Lord Sumner.

the high personages who are the chiefs of foreign states, are matters of which the Courts of this country take judicial notice. Instead of requiring proof to be furnished on these subjects by the litigants, they act on their own knowledge or, if necessary, obtain the requisite information for themselves. I take it that in so doing the Courts are bound, as they would be on any other issue of fact raised before them, to act on the best evidence and, if the question is whether some new State or some older State, whose sovereignty is not notorious, is a sovereign State or not, the best evidence is a statement, which the Crown condescends to permit the appropriate Secretary of State to give on its behalf. It is the prerogative of the Crown to recognize or to withhold recognition from States or chiefs of States, and to determine from time to time the status with which foreign powers are to be deemed to be invested. This being so, a foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English Court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed. I think this is the real judicial explanation why it was held that the Sultan of Johore was a foreign sovereign. In considering the answer given by the Secretary of State, it was not the business of the Court to inquire whether the Colonial Office rightly concluded that the Sultan was entitled to be recognized as a sovereign by international law. All it had to do was to examine the communication in order to see if the meaning of it really was that the Sultan had been and was recognized as a sovereign.

There may be occasions, when for reasons of State full, unconditional or permanent recognition has not been accorded by the Crown, and the answer to the question put has to be temporary if not temporising, or even where some vaguer expression has to be used. (1) In such cases not only has the Court to collect the true meaning of the communication for itself, but also to consider whether the statements as to

(1) [1919] P. 105.

sovereignty made in the communication and the expressions "sovereign" or "independent" sovereign used in the legal rule mean the same thing. Best C.J. says in *Yrisarri* v. *Clement* (1) that recognition is conclusive, but, if there is no recognition yet given, the independence becomes matter of proof. I conceive that, if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the Court might be entitled to accept secondary evidence in default of the best, subject, of course, to the presumption that, in the case of a new organization, which has de facto broken away from an old State, still existing and still recognized by His Majesty, the dominion of the old State remains unimpaired until His Majesty is pleased to recognize the change. In *The Charkieh* (2) the Foreign Office returned a definite and unambiguous answer that the Crown had never recognized the Khedive Ismail or his predecessors as sovereigns, but only as provincial authorities, albeit hereditary ones, who derived their authority and status from the Sultan of Turkey. This was conclusive, and hence it is that Brett M.R. indicated his opinion, that the further inquiries made by Sir R. Phillimore were unnecessary. In the present case there is a precise and sufficient statement as to the status of the Sultan of Kelantan, as recognized by His Majesty, with nothing ambiguous about it.

The questions, what are the boundaries of a foreign State? and also what communities or tribes are under its authority? apart from any recognition of their sovereignty or refusal to recognize it, are questions, which seem to me to stand on a different footing. I express no concluded opinion, but, for the purpose of making clearer the reasons above given by considering the converse case, I venture to suggest my present view.

In this connection two cases may be usefully compared: *Foster* v. *Globe Venture Syndicate* (3) and *Luther* v. *Sagor*. (4) In the former Farwell J. treated the question whether the

(1) 2 C. & P. 223, 225.
(2) L. R. 4 A. & E. 59.
(3) [1900] 1 Ch. 811.
(4) [1921] 1 K. B. 456 (on appeal [1921] 3 K. B. 532).

H. L. (E.) 1924 — DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT. — Lord Sumner.

Suss district was within the territories of Morocco as equivalent in character to the question whether the Suss tribes had or had not been recognized as independent. He appears to have thought that one matter for judicial notice was the geographical extent of the jurisdiction of the Suss tribes, if they were recognized as independent. I confess, though with the diffidence that I always feel in criticising so great a judge, that the two questions seem to me to be quite different. To ask if the Crown has recognized a State as a sovereign State is one thing; to ask exactly what the boundaries of that State are at any time and whether certain persons live within or without them is quite another. The reason acted on by Farwell J. was the expression quoted from *Thompson* v. *Barclay* (1): "The Courts of the King should act in unison with the Government of the King." This seems to be rather a maxim of policy than a rule of law. If, as Farwell J. supposed, cases had occurred in which the Crown had applied for redress of wrongs, suffered locally by British subjects, either to the Sultan of Morocco or to the head of the independent Suss tribes, such an act would have been in the former case a recognition of the Sultan as sovereign of the district in question, and in the latter a recognition of the Suss tribes both as a sovereign State and as exercising that sovereignty in that district. No doubt the statement of the Foreign Office that this was so would be conclusive. Either it would state the recognition of the Suss tribes or it would state the recognition of the extent of the Sultan's local sovereignty, much as if application had been made by the Sultan for an exæquatur for a British Consul to be stationed in the district. Probably Farwell J. meant no more than this. The frontiers of foreign countries are matters of geography, not always involved with matters of State. Certainly it is not always safe for Courts to form their own impression on such subjects. Hong Kong, for example, has been spoken of judicially as if it were a Chinese port: *Nobel's Explosives Co.* v. *Jenkins & Co.* (2) It does not, however, follow that, on mere questions of this

(1) 2 Sim. 213, 221. (2) (1896) 1 Com. Cas. 436, 439.

kind, resort ought to be had to the Foreign Office, or that its answer, if given, must necessarily be taken to be correct in fact. I do not think it has yet been held or ought to be held that the Crown must be deemed to know all the geographical boundaries of all foreign States at all times, and this so that its statement on the subject would be conclusive. Contiguous States have often disputed their common boundary, and no other State has had occasion to know where it runs any better than they have done themselves. This was so in the last century with regard to the northern boundary of the State of Maine and Canada, and of the common frontier in the Oregon Territory. More recently there have been cases of this kind between the various Republics of South America. How can a judge of the High Court take judicial notice of untraced lines, and how can His Majesty's Government tell him with authority exactly where they are? I doubt very much if the boundaries of the dominions of the Emir of Riad in Central Arabia were exactly known to any European Government ten years ago, or if those of the Borku and Wadai tribes in the Southern Libyan Desert are definitely known to-day. I think such boundaries, where no acts of the Crown with regard to them have been involved, must depend on evidence given in the ordinary way.

Again, it is not indispensable that the information should have been solicited from the competent Government department by the Court itself. In *Luther* v. *Sagor* (1) the evidence put in by the parties included several letters from the Foreign Office relating to the recognition (if it amounted to recognition), which His Majesty had been advised to extend to the Soviet Government, though subsequently the Court made further inquiries of its own. The letters put in before Roche J. stated that the Soviet Government had not been recognized in any way, but that M. Krassin personally was regarded by the Foreign Office as a foreign representative, who should be exempt from legal process, though this point was left to the better judgment of the Courts, and on this evidence he

(1) [1921] 1 K. B. 456, 477.

H. L. (E.) 1924 DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT. Lord Sumner.

held that the Soviet Government was not a sovereign State. Before the Court of Appeal a further letter from the Foreign Office was admitted, which stated at a later date that His Majesty's Government did recognize the Soviet Government de facto, and on this further evidence alone the decision below was reversed. In both Courts information communicated by the Foreign Office was received as being the proper material on the question of the status of the Soviet Government of Russia, and neither Court refused nor thought itself bound to refuse to consider such information merely because it had been obtained by the parties and by them submitted to the Court. Both Courts proceeded to consider the meaning and effect of the various communications and, in view of the fact that, as Roche J. puts it, they were "as clear as the indeterminate position of affairs in connection with the subject matter of the communications enabled them to be" (which to be sure was not luce clarius), I have no doubt that the construction was a matter for argument before and for decision by the Courts. As it seems to me, no such question arises in the present case. Here there is an explicit statement that the Sultan of Kelantan is an independent sovereign, and about this there is no possible ambiguity. To inquire what constitutes independence and whether the Treaty cited in the letter does or does not impair his independence seems to me to be irrelevant. We should really question the correctness of the course taken by His Majesty in regarding this potentate as a sovereign, if we were to discuss the question, how far the Sultan's sovereignty is reconcilable with the terms of the Treaty.

The second question which arises, though narrower in scope, is no less important—namely, the question how far, if at all, His Highness the Sultan (who really is, and, in my opinion, ought to have been made, the formal respondent on the record) has submitted to the jurisdiction of the High Court. It is raised in this way: first, whether he has in any way submitted himself to the jurisdiction to enforce the award as a judgment, which I think is strictly the only issue to be determined, and second, whether he has in any way

submitted his property to any process or all processes of execution of a judgment validly pronounced against him, either in respect of costs, where he has been the applicant, or in respect of the award itself. The latter raises a far-reaching and fundamental question, which, if answered in favour of the appellants, involves allowing the appeal, and as I conceive materially alters the law hitherto prevailing on this subject.

The Sultan's contract to arbitrate in accordance with the Arbitration Act is not, either in itself or in combination with anything else in this case, a submission to the jurisdiction of the High Court. It is not an undertaking given to the Court itself. It is an agreement inter partes, and no more. An agreement inter partes that the Court shall be enabled to do something, which by law it cannot do, is of no avail, whether it is by statutory rules that the Court is thus incompetent: *British Wagon Co.* v. *Gray* (1), or by a general rule of the common law, like that which gives or creates a foreign sovereign's immunity. Ordinary persons can contract themselves out of the formalities, which the orders and rules prescribe for proceedings, which the Court has power to take: *Montgomery* v. *Liebenthal.* (2) So too, acting under statutory authority, the High Court allows service of its writ, or of notice of its writ as the case may be, on parties outside the jurisdiction, who, if within it, would have been personally amenable. Sovereigns, however, are not amenable at all, except by their own consent, and there is no principle upon which such consent can be deemed to have been given short of action taken towards the Court itself, such as is commonly called a submission to the jurisdiction. It is, therefore, necessary to find something voluntarily done by the foreign sovereign in or towards the Court and to find in what is done something that really evinces an intention to submit. This seems to me to be beyond the limits of presumption or fiction, for the foundation of the jurisdiction is not any rule of municipal law but the action of an independent personage, who himself is beyond its reach.

(1) [1896] 1 Q. B. 35.
(2) [1898] 1 Q. B. 487.

H. L. (E.) 1924 — DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT. — Lord Sumner. —

My Lords, I refrain from expressing any opinion on the question whether or not a foreign sovereign who has submitted to the jurisdiction by appearing in a proceeding in a municipal Court thereby submits himself or his property to any of the processes of execution in case judgment should be pronounced against him. The question has been discussed, but I agree with your Lordships in thinking that it does not arise for decision on this occasion. I only desire to say that in refraining from dealing with the point I am not to be taken as doubting the reasoning contained in the judgments in the garnishee proceedings between the present parties.

My Lords, I agree that the appeal should be dismissed.

LORD CARSON. My Lords, I must confess that if it was open to me to disregard the statements contained in the letter from the Secretary of State for the Colonies, that "Kelantan is an independent State and the present Sultan is the present sovereign ruler thereof," I would find great difficulty in coming to that conclusion of fact, having regard to the terms of the documents enclosed in the letter from the Secretary of State. It is, in my opinion, difficult to find in these documents the essential attributes of independence and sovereignty in accordance with the tests laid down by the exponents of international law. It is, however, unnecessary to pursue that investigation or to examine the very ample material put before us in the arguments of Mr. Maugham, as I agree with your Lordships that the Courts of this country are bound to take judicial notice of the status of any other country in accordance with the information afforded to them by the proper representative of the Crown. As Lord Esher said in the case of *Mighell* v. *Sultan of Johore* (1): "When once there is the authoritative certificate of the Queen through her Minister of State as to the status of another sovereign, that in the Courts of this country is decisive." Indeed, it is difficult to see in what other way such a question could be decided without creating chaos and confusion, the more especially so when we consider that "many States,

(1) [1894] 1 Q. B. 149, 158.

regarded as sovereign, do not exercise the right of self-government entirely independent of other States, but have their sovereignty limited and qualified in various degrees, either by the character of their internal constitution, by stipulations of unequal treaties of alliance, or by treaties of protection or of guarantee made by a third Power": Halleck, p. 67. And, in truth, it is the recognition of the status of the Government which must be the main element to determine this question; the only proper evidence of which can be supplied by the officer representing the Crown.

The cases upon this subject have been already referred to, and they are discussed at considerable length in the judgment of the Master of the Rolls. Treating, therefore, the Government of Kelantan as a sovereign State, it follows that prima facie, at all events, neither the Government nor its property is subject to the jurisdiction of the Courts of this country. "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction": *The Parlement Belge.* (1)

It is necessary to note, with a view to subsequent consideration of the present case, that "the real principle," as stated by Lord Esher in the same case, "on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority," and this privilege every sovereign or

(1) 5 P. D. 197, 207, 214.

H. L. (E.) 1924 DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT. Lord Carson.

sovereign Power has a right to claim. The main contention, however, of the appellant in the present case is that wherever a sovereign State has submitted to the jurisdiction of our Courts, it waives its privileges, and must for the purpose of doing justice be treated in exactly the same way as any other litigant. The general proposition upon this subject is, I think, accurately stated in Westlake's Private International Law, 6th ed., p. 259, s. 192: "But a foreign state or person entitled to the privilege of exterritoriality, bringing an action in England, will be bound as a private corporation or person would be bound to do complete justice to the defendant with regard to the matters comprised in the action, and will be subject to all cross-actions, counterclaims, defences and steps of procedure which as between private parties would be competent to the defendant for the purpose either of obtaining such complete justice or of defending himself against the plaintiff's claim," and the editor quotes Paulus, Digest 5, 1, 22: "Qui non cogitur in aliquo loco judicium pati, si ipse ibi agat, cogitur excipere actiones et ad eundem judicem mitti."

It is to be observed that the main principle underlying the cases referring to the exercise of jurisdiction by our municipal Courts is that it was necessary that a sovereign Power should be considered to have waived its privileges and be treated as other litigants for the purpose of enabling complete justice to be done between the parties: see *King of Spain* v. *Hullet* (1), and also the judgment of James L.J. in *Strousberg* v. *Republic of Costa Rica.* (2) It is interesting to note that in the former case, where the King of Spain unsuccessfully resisted an application that he should answer a cross-bill personally and upon oath, the argument used on his behalf was that contended for by Mr. Upjohn as one of the reasons for resisting the grant of execution—namely: "It is impossible," said the Attorney-General, "for the appellant to do so consistently with his independent sovereign character, according to the principles of the law of nations, as practised between all European states, and his admitted

(1) 1 Cl. & F. 333, 345. (2) 44 L. T. 199.

relation to this country as head of the kingdom of Spain." It is in applying this principle of equal treatment that the sovereign submitting to the jurisdiction has been ordered to give security for costs and also security for damages: see *The Newbattle* (1), and it is difficult to find any principle on which such orders should be permitted if the sovereign was not liable to the ordinary results flowing from the judgment and execution. Indeed, so far as I can ascertain from such researches as I have been able to make, there is no authority which limits the power of the Courts in this country, when once a sovereign has submitted to its jurisdiction, to merely decide questions at issue and not to make a judgment effective by the issue of execution; the result of any such decision would have to make the decrees of our Courts sterile and ineffective. It is true that in *The Newbattle* Brett M.R. stated the proposition in this way (2): "It has always, however, been held that if a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court may make all proper orders against him. The Court has never hesitated to exercise its powers against a foreign Government to this extent. It is another question as to what may be the result of an application for execution by seizure of the plaintiffs' ship if the judgment should be against the plaintiffs," but that is not a decision that the judgment of the Court could not be enforced, and rather suggests that there may be questions as to the nature of the particular property which may be taken in execution.

The real crux, however, is as to whether the Government of Kelantan has waived its privileges, and if so, how far, under the circumstances disclosed in the present case. The deed of cancellation under which the arbitration was held contained in cl. 21 a submission to arbitration by the Government of Kelantan, which provides that "this shall be deemed a submission to arbitration within the Arbitration Act 1889 or any statutory modification or re-enactment thereof for the time being in force the provisions whereof shall apply so far as applicable." Now the Arbitration Act

(1) 10 P. D. 33. (2) 10 P. D. 35.

H. L. (E.) 1924

DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT.

Lord Carson.

of 1889, under the heading of "References by consent out of Court," by the first section provides as follows: "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court."

The jurisdiction therefore of the Court to see that the submission is duly carried out and the machinery for making it effective attaches from the moment of the submission, and a refusal to comply with an award made on a submission in writing is a contempt of Court and might in certain cases have been punished by attachment. I fail to see how the principles to which I have already referred of doing complete justice where a sovereign has waived his privileges can be carried out if it is to be held, as it has been held apparently in this case, that at each step when it is necessary to invoke the assistance of the Court the sovereign Power can claim such assistance, but can when it is demanded by the other party raise as a defence that he is protected by his sovereignty. Take, for instance, the present case; the arbitration was duly held in pursuance of the submission and the sovereign Power duly appeared as a party, and when an award was made against him, claimed the right to appeal to the Courts and finally to your Lordships' House to set aside the award under s. 11, and no doubt if he had been successful would have claimed and would have been held entitled to levy execution against the appellants for the costs of such award. Similarly, if the award had been in his favour, he would have been entitled to claim, as the appellants now claim, under cl. 12 to enforce the award "in the same manner as a judgment or order to the same effect."

My Lords, under such circumstances as these, how can it be said that, when the act of the sovereign Power has invoked the benefits of the procedure devised by the laws of this country for enforcing its claims or settling its disputes, "international comity which induces every sovereign State to respect the independence and dignity of every other

sovereign State" requires that our Courts should lend themselves to such palpable injustice as to refuse a mutual relief to both parties concerned? or how can it be suggested that under such circumstances we would be acting upon the principles laid down in the cases I have already quoted of doing complete justice between the parties if we refused the application of the appellants? I do not myself see any difference in principle between the present case and those in which cross-actions were allowed in order that both sides should receive equal justice, nor do I think we are entitled to consider each step taken for the purpose of carrying out the proceedings necessary for making the award effective as a separate invocation of the jurisdiction of the Court which required a separate submission by the sovereign State to give it jurisdiction; rather should we consider that the Government of Kelantan by agreeing to the submission which became an order of Court and taking the course they did, are bound to treat the matter as one proceeding, in which the sovereign State has waived its privileges and in which justice can alone be done by making the law applicable equally to both parties.

In my opinion, this appeal should be allowed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, April 10, 1924.

Solicitors for the appellants: *Drake, Son & Parton.*

Solicitors for the respondents other than the Attorney-General: *Burchells.*

Solicitor for the respondent, the Attorney-General: *The Treasury Solicitor.*

[HOUSE OF LORDS.]

H. L. (Ir.)* 1924 *May* 1.

LONDON AND LANCASHIRE FIRE INSURANCE COMPANY, LIMITED . } Appellants;

AND

BOLANDS, LIMITED . . . . . Respondents.

Insurance—Burglary—"Riot"—Policy—Exceptions—Construction.

By a policy of assurance the appellants agreed to indemnify the respondents against loss by burglary, housebreaking, and theft of cash in the cashier's office in the respondents' bakery in Dublin, subject to the proviso that "this insurance does not cover loss directly or indirectly caused by or happening through or in consequence of (*a*) invasions, hostilities, acts of foreign enemy, riots, strikes, civil commotions, rebellions, insurrections, military or usurped power, or martial law, or the burning of property by order of any public authority. . . . ."

During the currency of the policy four armed men entered the respondents' premises on a summer evening while it was still daylight, held up the employees with revolvers, and took possession of all the money they could find in the cashier's office. There was no disturbance in the neighbourhood at the time. In answer to a claim by the respondents against the appellants to recover the loss the appellants relied on the proviso in the policy. The dispute having been referred to arbitration under a clause in the policy, the arbitrators, by an award stated in the form of a special case, being of opinion that the circumstances in which the money was stolen constituted a riot, found that the respondents were not entitled to recover:—

Held, that the proviso was not confined to the case where the theft was facilitated by an antecedent or simultaneous riot, but included a case where the theft itself in the manner in which it was conducted constituted a riot at law, and that the arbitrators were right in their conclusion.

Dictum of Ronan L.J. in *Boggan* v. *Motor Union Insurance Co.* [1922] 2 I. R. 184, 189 disapproved.

Order of the High Court of Appeal for Ireland reversed.

Appeal from an order of the High Court of Appeal for Ireland confirming an order of the Court of Appeal in Southern Ireland, which affirmed an order of the King's Bench Division of the High Court of Justice in Southern Ireland upon an award stated in the form of a special case.

By a policy of assurance dated February 28, 1920, the

* *Present:* Viscount Finlay, Lord Atkinson, Lord Sumner, Lord Blanesburgh, and Lord Darling.

appellants agreed to indemnify the respondents up to 5000*l.* against loss by burglary, housebreaking, and theft of cash in the cashier's office in the respondents' bakery, known as the City of Dublin Bakery. The policy contained the following proviso :—

"This insurance does not cover loss directly or indirectly caused by or happening through or in consequence of (*a*) invasions, hostilities, acts of foreign enemy, riots, strikes, civil commotions, rebellions, insurrections, military or usurped power, or martial law, or the burning of property by order of any public authority ; (*b*) incendiarism directly or indirectly connected with any of the circumstances or causes above mentioned in (*a*), and in the event of any claim arising hereunder for loss of the cash as herein described, the assured shall, if so required, and as a condition precedent to any liability of the company hereon, prove that the loss did not in any way arise under or through any of the above excepted circumstances or causes."

The policy also contained an arbitration clause.

On Saturday, June 25, 1921, at 9.45 P.M., the policy being still in force, four armed men entered the respondents' premises, held up with revolvers the employees, and took possession of cash from the cashier's office amounting to 1250*l.* odd. In answer to a claim by the respondents against the appellants to recover this loss the appellants relied on the proviso in the policy.

The dispute having been referred to arbitration in accordance with the clause in the policy, the arbitrators in para. 3 of their award found the facts relating to the raid as follows :—

The watchman, John Kilmurray, hearing a knock at the side door through which the staff came to work and thinking that Nolan the stableman (who always came in at that time) was knocking for admission unlocked the gate. When the gate was opened four men entered (none of whom were disguised), pushed in the watchman and ordered him to go down the yard. Then they searched him, and one of them directed him to put up his hands and kept him in that position

H. L. (Ir.) 1924 LONDON AND LANCASHIRE FIRE INSURANCE CO. v. BOLANDS, LD.

until the robbers left. The others rushed into the office, shouted "Hands up!" covering all who were present with revolvers—namely, the cashier, Mr. James J. Miley, vanman Gerald Murray, Patrick Hickey, Hugh Gaynor and James Nolan, and also another employee Patrick Chester. They asked where the telephone was and cut it. The cashier seeing a hand presenting a revolver at him from outside his office window had left the cash office enclosure, but at the door of the outer office was held up by one of the armed men who ordered him to put up his hands and stand further up the room. Hugh Gaynor, a vanman, who had just come in, had his money ready for the cashier on the counter of the office window; this money was taken by the man who levelled his revolver through the window at the cashier. Another of the vanmen, Gerald Murray, who had arrived a short time before Hugh Gaynor, was counting his cash with his assistant Patrick Hickey for payment to the cashier. The cash was also taken. One of the armed men came to where the cashier had been directed to stand and asked him to point out the safe, saying, "Have the contents of this" (revolver) "or give me the keys of the safe." The cashier pointed out the safe, which was open. It had been locked before the late vanman already named arrived, but had been opened to put away the cash received from him. Two of the robbers went to the safe and took what money they found there, but overlooked the larger bank notes and a quantity of treasury notes. The robbery occupied about ten minutes, and the employees present were warned not to leave the premises for a quarter of an hour. As already mentioned, the men were not disguised and the cashier was sure he could identify two of them. When he described the men to the police they expressed the opinion that they were the same men who on the previous Saturday night took a large sum of money from the office of another company of the same trade. After the vanman Gaynor had been searched at the window of the cash enclosure he succeeded when attention was withdrawn from him in making his way to the back of the premises, climbed over the back wall and shouted

"Robbers." A man with a revolver came up and ordered him to be silent. He grappled with this man and knocked him down, shouting at the same time for help. The stableman, Thomas Nolan—who was supposed by the night watchman to have knocked at the side door a few minutes earlier when the robbers effected an entrance—came up at this moment and assisted Gaynor to hold down the armed man, but another armed man ran up covering them with his revolver and ordered them to release the man whom they had overcome, and this they were obliged to do. The time was 9.45 P.M. Miley, the cashier, was on the premises on June 25, 1921, during the whole day, except while he went to the bank and to his dinner. There was no disturbance about the premises or in the street outside on that day or on the day before. He had no warning of the raid and nothing had occurred to lead him to expect it. Nothing of a similar sort had occurred in the previous week except a robbery on the Saturday of that week at Johnston, Mooney and O'Brien's Bakery at Ballsbridge. Ballsbridge was not in the immediate neighbourhood of Boland's mill. There was no riot or disturbance about the place.

The arbitrators found that on the evidence the claimants proved sufficiently that the loss did not in any way arise under or through civil commotion, but, being of opinion that the facts set out in the award in regard to the circumstances in which the money was stolen constituted a riot within the legal definition of the word, they found that the claimants were not entitled to recover any sum of money from the respondents in respect of the loss.

The question for the opinion of the Court was whether upon the facts stated in the award the arbitrators were justified in so finding. If the Court should be of opinion that they were not justified in so finding they awarded that the claimants were entitled to recover from the insurance office the sum of 1250*l.* 8*s.* 2*d.*

The King's Bench Division (Molony C.J. and Gordon J.) answered this question in the negative and gave judgment for the respondents (the claimants) for the amount claimed. This

H. L. (Ir.) 1924 LONDON AND LANCASHIRE FIRE INSURANCE CO. v. BOLANDS, LD.

decision was affirmed first by the Court of Appeal in Southern Ireland (the Lord Chief Justice of Ireland, Ronan and O'Connor L.JJ.), and afterwards by the High Court of Appeal in Ireland (the Lord Chancellor, the Lord Chief Justice of Northern Ireland and the Master of the Rolls), on the ground that the case was governed by *Boggan* v. *Motor Union Insurance Co.* (1) (subsequently reversed by the House of Lords. (2))

S. L. Brown K.C. (of the Irish Bar) (with him *Herbert D. Samuels* (of the English Bar) and *J. A. Murnaghan* (of the Irish Bar)) for the appellants.

The meaning of the word "riot" in this policy is in accordance with the well established legal meaning of the word. This case is indistinguishable from the decision of this House in *Motor Union Insurance Co.* v. *Boggan.* (2)

Fitzgibbon K.C. and *Marnan* (both of the Irish Bar) for the respondents. The meaning attributed to the word "riot" for the purpose of the criminal law is not necessarily the meaning to be adopted in construing a commercial contract, such as a policy of assurance: *Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Co.* (3); *Taylor* v. *Liverpool and Great Western Steam Co.* (4) It is conceded that these men might have been indicted for a riot, but no one reading this policy would have supposed that a robbery by four men was a riot within the meaning of the proviso. "Riot" is here used in its ordinary and popular sense and means a tumultuous disturbance of the peace, so that it might be inferred that the police would be overawed. This was not a riot, but an armed burglary. The exception was introduced by reason of the Gordon riots into fire policies and it has since been copied into other policies. There must be a riot apart from the theft itself; otherwise, almost every robbery with violence would be outside the policy: per Ronan L.J. in *Boggan* v. *Motor Union Insurance Co.* (5)

(1) [1922] 2 I. R. 184.
(2) [1923] 2 I. R. 136.
(3) [1909] 1 K. B. 785, 790, 796, 798, 802, 803.
(4) (1874) L. R. 9 Q. B. 546.
(5) [1922] 2 I. R. 184, 189.

There was here no riot within Phillimore L.J.'s definition in *Field* v. *Receiver of Metropolitan Police.* (1)

S. L. Brown K.C. replied.

VISCOUNT FINLAY [after referring to the proviso in the policy and stating the facts from the case]. My Lords, the circumstances as they are stated seem to me to constitute what in the legal sense of the term would be a riot. Whether one looks at the acts that were done and threatened, or at the number of persons present, or at the whole surroundings, one is forced to the same conclusion, that it would be perfectly impossible to say that all the essentials to the constitution of the offence of a riot at law did not exist. There was a riot beyond all question.

Now it is said that the exception in the policy for loss by riot does not apply to this case, because the riot was in truth the theft itself under another name. The theft was conducted by a number of persons with considerable violence and threats of greater violence, and it is contended that where a riot is the effecting of the theft itself owing to the manner in which it is carried out, the exception does not apply. For the purpose of answering the question that arises on that one must look at the words of the policy: "Provided that this insurance does not cover loss in consequence of"—I take first the first three heads mentioned—"Invasions, Hostilities, Acts of Foreign Enemy." These are mentioned for the purpose of excluding all idea of anything done in the way of taking away money by foreign enemies, or in the course of anything that might be described as an invasion, and, in the case of hostilities generally, so as to exclude the idea that this would be a theft within the meaning of the policy. Well, that is perfectly true, and it is also true that these words are introduced for the purpose of excluding thefts which might take place in the confusion incidental to any of the things which are there enumerated under the three heads which I have just referred to—"Invasions, Hostilities, Acts of Foreign Enemy"—if they are "directly

(1) [1907] 2 K. B. 853, 860.

H. L. (Ir.) 1924 LONDON AND LANCASHIRE FIRE INSURANCE CO. v. BOLANDS, LD. Viscount Finlay.

or indirectly caused by, or happen through, or in consequence of," any of these things.

Then we come to the head of "Riots." I will pass by that for the moment, returning to it when I have run through the other heads. "Strikes." Strikes are mentioned, I presume, because, unfortunately, strikes are sometimes attended by a good deal of disorder, and it might happen that theft of money took place in the course of some disorders which originated out of a strike. "Civil commotions"—that we are not at liberty to deal with on this case, in my opinion, because the case is stated in a very special manner. The point was taken as stated on p. 8 of the Appendix, para. 4 of the Special Case, by the respondents: "The respondents denied liability on the grounds of riot and civil commotion; as to the latter ground, we find that on the evidence the claimants proved sufficiently that the loss did not in any way arise under or through civil commotion, but being of opinion that the facts as set out in para. 3 hereof in regard to the circumstances in which the money was stolen constituted a riot within the legal definition of the word, we find," that is, the arbitrators find, "and award that the loss was caused by or happened through or in consequence of a riot within the meaning of the said policy and that the claimants are not entitled to recover any sum of money from the respondents in respect of the said loss. The question for the Court is: Whether upon the facts herein stated we are justified in so finding." That I take to mean this: The question for the Court is whether in point of law the arbitrators could come to the conclusion at which they arrived as to the effect of the clause so far as "riot" is concerned. I do not read the reference to the Court on the case as extending at all to the question of civil commotion. That the arbitrators dealt with; they saw their way to deciding it right off, and they did not state any case with regard to the effect of the words "civil commotion," and it is quite impossible for us, in the absence of any reference to the Court as to whether in point of law the finding of the arbitrators could be supported, and in the absence of any power to the Court and to your

Lordships' House to draw inferences of fact, to say whether in their opinion the arbitrators were right or wrong in the conclusion of fact which they came to with regard to the question of civil commotion. That is entirely beyond the province assigned to your Lordships upon this appeal, on which we have to deal only with the question stated, and that is the question with regard to the word "riot." I have gone into that as my reason for not saying anything further about "civil commotion" as one of the heads in the proviso in the policy. Then it goes on: "Rebellions, insurrections, military or usurped power, or martial law, or the burning of property by order of any public authority (*b*) incendiarism directly or indirectly connected with any of the circumstances or causes above mentioned in (*a*)." I need not go through again the considerations to which I have adverted in dealing with the earlier heads in this paragraph; they equally apply to the heads which I have just referred to in the later part of the paragraph.

Now, my Lords, under these circumstances the question put to the Court, and with which your Lordships have on appeal to deal, is whether upon the facts herein stated the arbitrators were justified in finding "that the loss was caused by or happened through or in consequence of a riot within the meaning of the said policy and that the claimants are not entitled to recover any sum of money from the respondents in respect of the said loss." My Lords, I certainly am not prepared to find that the arbitrators were not justified in coming to that conclusion; on the contrary, I think that they were right. We have been told that the word "riot" here should not be read in its legal sense. In the course of the argument I myself asked several times if we were not to take the legal sense what then was the sense in which the word was to be read? I confess I have not heard any satisfactory answer to this question put by myself and by other members of your Lordships' House who have taken part in the hearing, and, so far from thinking, or saying, that the arbitrators were wrong, I am bound to say that I think they were perfectly

H. L. (Ir.) 1924

LONDON AND LANCASHIRE FIRE INSURANCE CO. v. BOLANDS, LD.

Viscount Finlay.

right. I do not see how it can be read satisfactorily in any other way.

Now, reference has been made to a very pointed passage in the judgment delivered in the case of *Boggan* v. *Motor Union Insurance Co.* (1) by Ronan L.J. The Lord Justice says this: "In dealing with this case we must consider whether the robbery occurred during a riot, or whether we must take clause 2 and exception (C) together, and read clause 2 as 'loss or damage by burglary, housebreaking, or theft, except where such burglary, housebreaking, or theft constitutes a riot in law.' That seems to me to be inconsistent with the policy as a whole. The meaning of the policy seems to be that if, while a riot is in progress, or, if there has been a riot, and in consequence of it, a theft takes place, the company is free; but the mere fact that the crime of theft itself contains elements of riot at law does not exclude the right of the insured under the policy. In that case every robbery for which on indictment the accused could technically be convicted also for riot would be outside the policy." I confess I am quite unable to accept the view which the Lord Justice seems to indicate in that passage as being that to which he is inclined. This policy was drawn up at a time when it seems to have been apprehended that there might be disturbances of various kinds in the country in which the cash, the subject of insurance, was situated; and then it provides against the inclusion in the policy of loss by theft occurring during, or in consequence of, various things, one of them being riot. As I have said, that there was a riot here in the circumstances in which this money was taken I think it is perfectly impossible to doubt. Force was used, and it is clear that those who were conducting the operation felt that they had force behind them and that they could control the situation—and that amounted to a riot. Why are we to say that the proviso does not apply? It seems to me that it does. Why should it apply only if the riot is a collateral event during which the theft takes place, and not apply to a riot one of the objects of which, at

(1) [1922] 2 I. R. 184, 189.

all events, was the actual committing of the theft? I cannot so cut down the language of the policy. I read it as applying to the circumstances of the present case, and it seems to me that the only conclusion at which we can satisfactorily arrive is that the arbitrators were right in the view which they took as to the construction of the policy and the facts relating to this robbery.

LORD ATKINSON. My Lords, I concur, and I have only a word to add. I think during part of the argument one would have supposed that the words "riot" and "burglary" were mutually inconsistent terms. There is no doubt that a riot may be committed in the course of a burglary or a burglary may be committed in the course of a riot, or a riot may be indulged in for the very purpose of committing a burglary. Now it would appear to me clear that the loss of this money upon this particular night was either caused directly or indirectly, or happened through or in consequence of what was done by these people on June 25. It would appear to me that the word "riot" has to be taken in its ordinary sense. What they did in bringing about the loss amounted to a riot. The arbitrators have construed the policy, and they have held that the word "riot" where it occurs in it means a riot in the ordinary sense, and they have found that the evidence given before them entirely supports and sustains that conclusion. Indeed, Mr. Fitzgibbon himself admitted that the people who were engaged in this attack upon this house could have been indicted and convicted upon that evidence of a riot, taking the word in its ordinary sense. Therefore, if this appeal is not to succeed one must conclude that the word "riot," as used in this proviso, has a sense differing from its ordinary sense, because it is admitted by counsel for the respondents that, if it is to be interpreted in its ordinary sense, the finding of the arbitrators cannot be disturbed. Well, during the progress of the argument I think all the different members of your Lordships' House on different occasions have endeavoured to find out what is the sense in which it is to be read if it is not the ordinary sense.

H. L. (Ir.) 1924 LONDON AND LANCASHIRE FIRE INSURANCE CO. v. BOLANDS, LD. Lord Atkinson.

What is this kind of diluted sense in which this word is to be read if not the ordinary sense? We have not been shown from either the nature of the document or the context in which the word is used, or from any other reason or source, why it is to receive any but the ordinary meaning. I think it must receive the ordinary meaning. It has received it at the hands of the arbitrators. I think that their decision was admittedly upheld by the evidence given before them, and that they came to a right conclusion; therefore their finding cannot be disturbed, and this appeal must accordingly succeed.

LORD SUMNER. My Lords, I agree. What was said in your Lordships' House in the case of *Boggan* (1) by two at least of the noble and learned Lords, apparently with the concurrence of others present, would in itself present considerable difficulties in the way of any one, who sought to distinguish that case from the present case. I should certainly have hesitated long before setting myself to that task, but, without relying exclusively upon that decision, I think that on a consideration of the words of the contract now in question the result must be the same, and that the appeal ought to succeed. There has been in this case, quite clearly, a loss by theft of the cash insured and described. Everything therefore turns upon the proviso relied upon by the appellants as excluding the loss in question from losses which are covered by the policy. The material words are these: "Provided that this insurance does not cover loss" (that is to say, the loss of the cash described) by theft "directly or indirectly caused by" a riot. Can it be said that this loss was not, either directly or indirectly, caused by a riot? I think it cannot. Can it be said that, when the learned arbitrators (who were in agreement upon this question) have found and awarded that the loss was caused by a riot, nevertheless, upon the facts found and stated by them, they were wrong? I answer, No.

My Lords, I do not question, of course, that the contention which has been urged on behalf of the respondents—and, so

(1) [1923] 2 I. R. 136.

far as I am concerned, urged in such a way as to incline me, if it were reasonably possible, in their favour—is not one which up to a point is borne out by the language of the proviso. That proviso no doubt does include cases where the theft is facilitated by an antecedent or a simultaneous occurrence such as is enumerated here; but it is not enough to say that it includes such cases, it is necessary to show that it is confined to them, and that I see no warrant for doing. It is true that the uninstructed layman probably does not think, in connection with the word "riot," of such a scene as is described in the case stated. How he would describe it I know not, but he probably thinks of something, if not more picturesque at any rate more noisy. There is, however, no warrant here for saying that, when the proviso uses a word which is emphatically a term of legal art, it is to be confined, in the interpretation of the policy, to circumstances which are only within popular notions on the subject, but are not within the technical meaning of the word. It clearly must be so with regard to martial law; it clearly, I think, must be so with regards to acts of foreign enemies; and I see no reason why the word "riot" should not include its technical meaning here as clearly as "burglary" and "housebreaking" do.

Furthermore the incidents, out of which this loss occurred, comply in my view with those very tests which were put forward to us as being essential to constitute a riot within the proviso. In broad daylight a gang of armed men, having obtained entrance into the premises by a trick, cow, if not terrorise, a superior number of persons, rushing into the place and shouting to them to hold up their hands and threatening them with death if they fail to do so. If the criminals had had more hardihood and had the courage to fire (which apparently they had not), when a couple of men of considerable nerve resisted them although unarmed, not only the noise but the resulting disturbance generally might have extended very far. It appears to me that it was a scene of tumult, and certainly a scene of disturbance of public peace, which to a layman as well as to a lawyer might

H. L. (Ir.) 1924 — London and Lancashire Fire Insurance Co. v. Bolands, Ld. — Lord Sumner.

well, on consideration of those aspects of it, be called a riot. So it seems to have struck the learned arbitrators; nor was it contested that, had the case been tried by a jury, there was evidence to go to a jury upon the application of the policy even in the sense of the word "riot" contended for by the appellants. It is also the case that some of these enumerated and accepted matters are such as do not directly cause a theft, though they may do so indirectly. That is true, I take it, of strikes and the burning of property by order of a public authority; but it is also true, on the other hand, that direct causes of theft may be found among several of the enumerated matters, that is, not merely in the word "riot," but also in acts of foreign enemies and in acts of usurped power, and, I imagine, in the words "civil commotion"; and, when you have a clause, which is adapted to cover two classes of causes, one a class which can only operate indirectly, and another a class which can operate both directly and indirectly, there is no reason for saying that the word "riot" belongs only to one of them. I think, therefore, on consideration of the construction, that it must be read against the assured.

It is suggested further that there is some ambiguity about the proviso, and that, under the various well-known authorities, upon the principle of reading words contra proferentes, we ought to construe this proviso, which is in favour of the insurance company, adversely to them. That, however, is a principle which depends upon there being some ambiguity—that is to say, some choice of an expression—by those who are responsible for putting forward the clause, which leaves one unable to decide which of two meanings is the right one. In the present case it is a question only of construction. There may be some difficulty, there may be even some difference of opinion, about the construction, but it is a question quite capable of being solved by the ordinary rules of grammar, and it appears to me that there is no ground for saying that there is such an ambiguity as would warrant us in reading the clause otherwise than in accordance with its express terms.

I therefore concur in the motion about to be proposed from the Woolsack.

Lord Blanesburgh. My Lords, during the course of the argument I was personally very strongly predisposed in favour of the view taken of such a proviso as we find in this policy by Ronan L.J. in the passage from his judgment in *Boggan* v. *Motor Union Insurance Co.* (1), which has been read by the noble and learned Viscount on the Woolsack. I am constrained, however, albeit somewhat doubtfully, to come to the conclusion that the answer to that view of the proviso has just been stated by the noble and learned Lord who has preceded me and, accordingly, although not without hesitation, I concur in the conclusion in this case which suggests itself as correct to the other members of the House.

Lord Darling. My Lords, I merely desire to say that I agree in the conclusion which has been reached by the noble and learned Lords who have spoken.

Order of the High Court of Appeal for Ireland reversed. The question of law submitted in the Special Case to be answered in the affirmative. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division of the High Court of Justice in Southern Ireland to do therein as shall be just and consistent with this judgment.

Lords' Journals, May 1, 1924.

Solicitor for the appellants: *W. C. Crocker, for Hoey & Denning, Dublin.*

Solicitors for the respondents: *Dyson, Bell & Co., for D. & T. Fitzgerald, Dublin.*

(1) [1922] 2 I. R. 184, 189.

[HOUSE OF LORDS.]

H. L. (E.)* 1924 May 23.

LA COMPAÑIA MARTIARTU . . . . APPELLANTS;

AND

CORPORATION OF THE ROYAL EXCHANGE ASSURANCE . . . . . } RESPONDENTS.

Insurance (Marine)—Scuttling of Ship—Evidence.

Decision of the Court of Appeal [1923] 1 K. B. 650 affirmed on the evidence.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Bailhache J.

In the view taken by their Lordships no question of law arose on the appeal.

1924. March 6, 7, 10. *Sir John Simon K.C.* and *Stuart Bevan K.C.* (with them *Earl of Halsbury* and *Sir Robert Aske*) for the appellants.

Sir Douglas Hogg K.C. (with him *Dunlop K.C.*, *George Langton* and *Ellis Cunliffe*) for the respondents.

The House took time for consideration.

May 23. Their Lordships were of opinion on the evidence that the respondents had proved that the ship was wilfully scuttled by the chief engineer with the privity of the appellants and dismissed the appeal.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 23, 1924.

Solicitors for the appellants: *Botterell & Roche.*

Solicitors for the respondents: *Holman, Fenwick & Willan.*

* *Present:* EARL OF BIRKENHEAD, VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER, and LORD CARSON.

(1) [1923] 1 K. B. 650.

[HOUSE OF LORDS.]

LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED . . . . . } APPELLANTS;

AND

SLACK . . . . . RESPONDENT.

H. L. (E.)* 1924 May 23, 30.

Ancient Lights—Threatened Obstruction—Quia timet Action—Jurisdiction to award Damages in lieu of Injunction—Chancery Procedure Amendment Act, 1858 (*Lord Cairns's Act*) (21 & 22 *Vict. c.* 27), *s.* 2—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 16—*Statute Law Revision and Civil Procedure Act*, 1883 (46 & 47 *Vict. c.* 49), *s.* 5—*Statute Law Revision Act*, 1898 (61 & 62 *Vict. c.* 22), *s.* 1.

The Chancery Procedure Amendment Act, 1858 (Lord Cairns's Act), s. 2, confers on the Court of Chancery jurisdiction to award damages in lieu of an injunction in the case of a threatened injury:—

So *held* by Earl of Birkenhead, Viscount Finlay, and Lord Dunedin; Lord Sumner and Lord Carson dissenting.

Opinion of the Court of Appeal in *Dreyfus* v. *Peruvian Guano Co.* (1889) 43 Ch. D. 316 disapproved.

Notwithstanding the repeal of Lord Cairns's Act by the Statute Law Revision and Civil Procedure Act, 1883, the combined effect of s. 16 of the Judicature Act, 1873, and s. 1 of the Statute Law Revision Act, 1898, is to maintain in force the jurisdiction conferred by s. 2 of Lord Cairns's Act.

Where therefore an action was brought in the Chancery Division for an injunction to restrain an obstruction of ancient lights, and the Court found that the defendant's buildings when completed would cause an actionable obstruction to the plaintiff's lights, but that no such obstruction had yet taken place:—

Held (by the same majority), that the Court had jurisdiction to award damages in lieu of an injunction.

Decision of the Court of Appeal [1923] 1 Ch. 431 reversed.

APPEAL from an order of the Court of Appeal, affirming a judgment of Romer J. (1)

The action was brought by the respondent against the appellant society for an injunction and damages in respect of an alleged obstruction of ancient lights.

Romer J. found that the appellants' buildings when completed would cause an actionable obstruction to the

* *Present:* EARL OF BIRKENHEAD, VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER, and LORD CARSON.

(1) [1923] 1 Ch. 431.

H. L. (E.) 1924 LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK.

respondent's lights, but that no such obstruction had yet taken place, and he expressed the opinion that the interference with the respondent's legal rights when the building was completed would be small, and could be adequately compensated by damages, but held, contrary to his own opinion, that he was bound by the opinion of the Court of Appeal in *Dreyfus* v. *Peruvian Guano Co.* (1), that there was no jurisdiction under Lord Cairns's Act to give damages in lieu of an injunction where the injury was threatened but had not been sustained, and he therefore granted an injunction.

The Court of Appeal, without going into the merits, by a majority (Lord Sterndale M.R. and Warrington L.J.; Younger L.J. dissenting), upheld the view that the Court had no jurisdiction to award damages in lieu of an injunction in a case of threatened injury.

Sect. 2 of Lord Cairns's Act is set out in the opinion of Viscount Finlay.

1924. March 13, 14, 17, 18. *H. Cunliffe K.C.* and *W. E. Vernon* for the appellants. Upon the true construction of s. 2 of Lord Cairns's Act it confers upon the Court of Chancery jurisdiction to award damages in lieu of an injunction where the injury is threatened as well as where the injury is actually committed. Where the section refers to the power of the Court of Chancery to grant an injunction "against the commission or continuance of any wrongful act" the fair inference from the language is that it is dealing with future as well as existing wrongs. It is objected that the phrase "damages to the party injured" points to wrongs actually committed, but "damages" in this connection is not limited to the strict common law meaning of the word, but means a money compensation for the injury, whether committed or threatened; and "party injured," in the eye of the Court of Chancery, includes a party threatened to be injured. This must be so unless injunctions are limited to mandatory injunctions. All the members of the Court of Appeal were personally of opinion that the Act intended to empower the

(1) 43 Ch. D. 316.

Court of Chancery to award damages in lieu of an injunction in a quia timet action, but the majority decided contrary to their own opinion in deference to the opinion of Bowen L.J., concurred in by Cotton and Fry L.JJ., in *Dreyfus* v. *Peruvian Guano Co.* (1) That opinion, as regards the majority of the Court, was obiter only, and the Master of the Rolls and Warrington L.J. in this case should have given effect to their own view of the Act. Down to the time when *Dreyfus* (1) was decided it was assumed that the Act conferred on the Court of Chancery jurisdiction to award damages in lieu of an injunction in the case of an apprehended injury: *Stokes* v. *City Offices Co.* (2); *Senior* v. *Pawson* (3); and in two cases—*Holland* v. *Worley* (4) and *Allen* v. *Ayres* (5)—this jurisdiction was exercised by Pearson J. Since the *Dreyfus Case* (1) the question has been treated as open by the Court of Appeal: *Martin* v. *Price* (6), and see *Shelfer* v. *City of London Electric Lighting Co.* (7); *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (8) The observations of Lord Macnaghten and Lord Lindley in *Colls* v. *Home and Colonial Stores* (9) also tend to support the appellants' contention. Although Lord Cairns's Act has been repealed by the Statute Law Revision and Civil Procedure Act, 1883, the jurisdiction conferred by that Act still remains in force, either by virtue of the saving clause in the Statute Law Revision Act, 1898, or by virtue of s. 16 of the Judicature Act, 1873: *Sayers* v. *Collyer* (10); *Chapman, Morsons & Co.* v. *Auckland Union* (11); *Colls* v. *Home and Colonial Stores.* (12)

Hughes K.C. and *J. E. Harman* for the respondent.

In the case of a threatened violation of a legal right the ordinary remedy is an injunction: *Imperial Gas Light and Coke Co.* v. *Broadbent* (13); *Stollmeyer* v. *Petroleum Development*

(1) 43 Ch. D. 316.
(2) (1865) 13 L. T. 81.
(3) (1866) L. R. 3 Eq. 330.
(4) (1884) 26 Ch. D. 578.
(5) [1884] W. N. 242.
(6) [1894] 1 Ch. 276.
(7) [1895] 1 Ch. 287, 311, 315, 319, 322-3.
(8) [1898] 2 Ch. 614; [1899] 2 Ch. 217, 237-8, 240, 259.
(9) [1904] A. C. 179, 192-3, 212.
(10) (1884) 28 Ch. D. 103, 107.
(11) (1889) 23 Q. B. D. 294, 299, 300.
(12) [1904] A. C. 188.
(13) (1859) 7 H. L. C. 600, 612.

H. L. (E.) 1924

LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK.

Co. (1); *Black* v. *Scottish Temperance Life Assurance Co.* (2) It is difficult to suppose that the Legislature, by an Act which is shown by its title and by the preamble to be an Act relating to procedure, intended to create a new right and to license the continuance of a tort on payment of a money compensation. "Injured party" means a party who has been injured and cannot include a party who expects to be injured. So also "damages" means compensation for a wrong done and does not include compensation for an apprehended wrong. In every light and air case it is now necessary to prove a substantial interference to give a title to relief: *Colls' Case* (3), i.e., to an injunction, unless the Court has power to give damages in lieu of it. There is at present no power to compel a man to sell his rights on the terms of getting a money compensation. On the contrary the Court has always repudiated any such notion: *Krehl* v. *Burrell* (4); *Shelfer's Case* (5); *Cowper* v. *Laidler* (6); *Litchfield-Speer* v. *Queen Anne's Gate Syndicate* (*No.* 2.) (7) The only object of the Act was to confer on the Court of Chancery the same power of awarding damages as a common law Court already had: *Ferguson* v. *Wilson.* (8) The opinion of the Court of Appeal in the *Dreyfus Case* (9) was carefully considered after the point had been taken in argument, it was delivered 30 years ago, and has been recognized as binding from that time. Since that decision no case has arisen in which an order for damages in lieu of an injunction for a prospective wrong has been made and supported. It is conceded that the powers of Lord Cairns's Act, whatever they are, are still in force: *In re R.* (10) Assuming that the House does not accede to the respondent's argument, the case should be remitted to the Court of Appeal to be heard on the merits.

H. Cunliffe K.C. replied.

(1) [1918] A. C. 498*n*.
(2) [1908] 1 I. R. 541, 577, 580.
(3) [1904] A. C. 179.
(4) (1878) 7 Ch. D. 551, 554; 11 Ch. D. 146.
(5) [1895] 1 Ch. 287, 311, 315.
(6) [1903] 2 Ch. 337, 342-3.
(7) [1919] 1 Ch. 407, 415.
(8) (1866) L. R. 2 Ch. 77, 88, 91-2.
(9) 43 Ch. D. 316.
(10) [1906] 1 Ch. 730, 735.

[The following cases were also referred to: *Anderson* v. *Francis* (1); *Isenberg* v. *East India House Estate Co.* (2); *Fritz* v. *Hobson* (3); *Aynsley* v. *Glover* (4); *Kine* v. *Jolly* (5); *Paul* v. *Robson* (6); *Curriers' Company* v. *Corbett* (7); *Durell* v. *Pritchard* (8); *Bowes* v. *Law* (9); *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (10); *Bailey & Son* v. *Holborn and Frascati* (11); *Emperor of Austria* v. *Day and Kossuth* (12); *Jackson* v. *Duke of Newcastle* (13); *Wynstanley* v. *Lee* (14); *Attorney-General* v. *Nichol* (15); *Robson* v. *Whittingham.* (16)]

The House took time for consideration.

1924. May 23. VISCOUNT FINLAY. My Lords, this action was brought on May 15, 1922, by Slack, the respondent in the present appeal, against the appellant society. The claim was (1.) for an injunction restraining the further erection of certain buildings by the society so as to obstruct the plaintiff's ancient windows in Nos. 2, 3 and 4, Albion Square, Leeds; (2.) for an order on the defendants to pull down so much of the building as caused such an obstruction; and (3.) for damages. The case was tried by Romer J., who found that the defendants' buildings when completed according to the plan would cause an actionable obstruction of the plaintiff's lights, but that no such obstruction had yet taken place. He further said that in his opinion the interference with the plaintiff's legal rights when the building was completed would be small and capable of being estimated in money, and that the plaintiff could be adequately compensated by damages. He said, however, that he considered he ought to act upon the opinion expressed by the members

(1) [1906] W. N. 160.
(2) (1863) 3 D. J. & S. 263.
(3) (1880) 14 Ch. D. 542.
(4) (1874) L. R. 18 Eq. 544, 554; (1875) L. R. 10 Ch. 283.
(5) [1905] 1 Ch. 480, 481; [1907] A. C. 1.
(6) (1914) L. R. 41 Ind. Ap. 180.
(7) (1865) 4 D. J. & S. 764.
(8) (1865) L. R. 1 Ch. 244, 250.
(9) (1870) L. R. 9 Eq. 636.
(10) (1877) 6 Ch. D. 757.
(11) [1914] 1 Ch. 598.
(12) (1861) 3 D. F. & J. 217, 240.
(13) (1864) 3 D. J. & S. 275, 283.
(14) (1818) 2 Swanst. 333.
(15) (1809) 16 Ves. 338.
(16) (1866) L. R. 1 Ch. 442.

H. L. (E.) 1924 LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK. Viscount Finlay.

of the Court of Appeal in *Dreyfus* v. *Peruvian Guano Co.* (1), that there was no jurisdiction to give damages in a case in which no injury had accrued, and therefore he granted an injunction restraining the defendants from the prosecution of the building so as to cause illegal obstruction to the plaintiff's windows.

The Court of Appeal by a majority, Lord Sterndale M.R. and Warrington L.J., dismissed an appeal by the society, Younger L.J. dissenting. The society now appeal to your Lordships' House, asking that it may be held that the Court has jurisdiction to give damages, that the order for an injunction should be reversed and the case remitted to the Chancery Division to make the proper order under the circumstances. Your Lordships are asked on this appeal to deal solely with the question of jurisdiction to award damages in such a case as the present.

Until Lord Cairns's Act of 1858 damages could be obtained only in a Court of common law. Such damages were given only in respect of a cause of action which had accrued at the date of the commencement of the action. No damages could be recovered for injury which was merely threatened, but, of course, the damages might include compensation for consequences of the injury already committed which it was proved would occur in the future.

In 1858 Lord Cairns's Act was passed (21 & 22 Vict. c. 27). Sect. 2 is as follows: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct."

Learned and elaborate arguments have been addressed to your Lordships' House upon the construction of this

(1) 43 Ch. D. 316.

enactment—does it empower the Court to award damages in lieu of an injunction when injury is threatened but has not yet been done ?

In my opinion this question must be answered in the affirmative. The power given is to award damages to the party injured, either in addition to or in substitution for an injunction. If the damages are given in addition to the injunction they are to compensate for the injury which has been done and the injunction will prevent its continuance or repetition. But if damages are given in substitution for an injunction they must necessarily cover not only injury already sustained but also injury that would be inflicted in the future by the commission of the act threatened. If no injury has yet been sustained the damages will be solely in respect of the damage to be sustained in the future by injuries which the injunction, if granted, would have prevented.

The power conferred on a Court of Chancery by Lord Cairns's Act included power to give damages in respect of a past injury. This in itself was a useful extension of jurisdiction, as it would prevent the hardship involved by the necessity of going to another Court to get such relief. But the enactment did not stop there. In terms it gave power to substitute damages for an injunction. Such a substitution in the very nature of things involves that the damages are to deal with what would have been prevented by the injunction if granted. In the present case the building has not proceeded far enough to constitute an actionable wrong in respect of the plaintiff's lights, and an injunction would prevent the commission of that wrong in the future. On what principle can it be said that, until there has been *some* interference with the plaintiff's windows, the Court cannot give damages in lieu of an injunction against obstruction ? Such a construction would impose a purely arbitrary and meaningless restriction on the relief to be given under the Act. To say that the power to give damages under Lord Cairns's Act applies only to what has already been done, would be at least logical, and this was the proposition put forward by Mr. Hughes in his most admirable argument for the respondent ; but it seems

H. L. (E.) 1924

LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK.

Viscount Finlay.

to me that it is inconsistent with the terms of the Act and that it would in practice nullify the provision that damages may be given in substitution for an injunction.

It is, however, the fact that in the case of *Dreyfus* v. *Peruvian Guano Co.* (1) an opinion was expressed by Bowen L.J., with the concurrence of Cotton and Fry L.JJ., that Lord Cairns's Act did not confer on the Court of Chancery any jurisdiction to award damages in a case in which no wrongful act had been committed by the person against whom an injunction is sought. This view was not necessary for the conclusion at which the majority of the Court arrived, but it appears to have been carefully considered. It has always been treated, and always must be treated, with the utmost respect; but even if there had been an actual decision of the Court of Appeal it would, of course, not be binding upon your Lordships' House. It has been discussed on many occasions, and it is now your Lordships' duty to consider whether the opinion was well founded.

Attempts have been made on behalf of the appellants in the present case to explain away what was said in *Dreyfus' Case.* (1) These attempts have, in my opinion, entirely failed. Whether right or wrong, what was said by Bowen L.J. and assented to by the other members of the Court is perfectly clear. Sir Horace Davey had asserted that, though it might be assumed that there had been no tortious act in law at all, damages might be given, because Lord Cairns's Act had clothed the Court of Chancery with jurisdiction to give them on a threat of injury which would give rise to the jurisdiction for injunction. Bowen L.J. said in terms that the Act did not clothe the Court of Chancery with any such jurisdiction: "It is true," he said (2), "the section applies in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction, but the only weapon with which the Court is armed by virtue of the section is to award damages to a party injured, which must, I think, mean damages where damages have arisen, and in a case where no damages have arisen in the ordinary sense of the term as known to

(1) 43 Ch. D. 316. (2) 43 Ch. D. 333.

lawyers, I am of opinion the Court has no power to give damages."

I am unable to take this view of the Act. It appears to me that such a view must proceed upon the basis that the power of giving damages for torts which Lord Cairns's Act confers upon the Court of Chancery was only to give damages according to the rules which had prevailed in the Courts of common law and in respect of wrongs already committed. This would confine the operation of the Act within very narrow limits and appears to me not to be reconcilable with the language of the Act. Injunctions are given to prevent wrongs which are threatened, and the power to give damages in lieu of an injunction must in all reason import the power to give an equivalent for what is lost by the refusal of the injunction; for this purpose compensation only for what has passed would be futile. On the other hand, there would be no sense in saying that the accrual of *some* injury is to be a condition precedent to damages in place of an injunction.

It has been suggested that it follows from the provision that the power is to give damages to the party injured that some injury must have happened. The words "to the party injured" seem to me quite apt according to the ordinary use of language to denote parties injured or to be injured, including those who will be injured by buildings against which the Court refuses an injunction. Sect. 2 deals with cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction "against the commission or continuance of any wrongful act." Some particular tort is threatened, nothing has yet been done. The commission can be restrained by injunction. How can it be said that the power to give damages instead of an injunction does not apply in such a case? It has been urged that the word "damages" must be used as denoting compensation for what has already happened. It is, of course, true that a Court of common law gives damages as compensation for past wrongs, but the word "damages" is perfectly apt to denote compensation for the damage which will be sustained if a building is allowed to proceed so as

H. L. (E.) 1924 LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK. Viscount Finlay.

to obstruct ancient lights. If an injunction is granted the obstruction will never take place. If damages are given instead of the injunction, they must be in respect of an injury which is still in the future.

With the utmost respect for the members of the Court of Appeal in *Dreyfus* (1), and more particularly for Bowen L.J., I feel constrained to say that I am unable to concur in the opinion given in that case on this point.

There has been no such general acquiescence in the correctness of that opinion as to make it inconvenient that we should put upon the Act the construction which seems to us the natural and right one. For the present purpose it is sufficient to quote what was said on this subject in 1893 by Lindley L.J. in the case of *Martin* v. *Price* (2): "The question whether the Court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended, is by no means free from difficulty. On the one hand, this Court, in *Dreyfus* v. *Peruvian Guano Co.* (1), expressed a clear opinion against the existence of such jurisdiction. On the other hand, it has been very commonly assumed, and there are several observations by eminent judges favouring the view, that there is such a jurisdiction; and in *Holland* v. *Worley* (3) the late Mr. Justice Pearson did award damages in lieu of an injunction which, if granted, would have been simply preventive, and in no sense mandatory. The question is one of very great importance; but we do not think it right to keep the parties waiting while we make up our minds upon it." And so the case of *Martin* v. *Price* (4) was decided upon special grounds which left open the question which now arises for decision.

It has been urged as an objection to the construction of Lord Cairns's Act above stated, that it would give the Chancery Courts power to legalise the commission of torts by any defendant who was able and willing to pay damages. The Courts have on more than one occasion expressed their

(1) 43 Ch. D. 316.
(2) [1894] 1 Ch. 276, 284-5.
(3) 26 Ch. D. 578.
(4) [1894] 1 Ch. 276.

determination to prevent any abuse of the Act in this direction. It is sufficient to quote two passages from the reports on this subject. The first occurs in the judgment of Lindley L.J. in *Shelfer* v. *City of London Electric Co.* (1): "The jurisdiction to give damages instead of an injunction is in words given in all cases; but the use of the word 'damages' has led to a doubt whether the Act applies to cases where no injury at all has yet been inflicted, but where injury is threatened only. Subject, however, to this doubt, there appears to be no limit to the jurisdiction. But in exercising the jurisdiction thus given attention ought to be paid to well settled principles; and ever since Lord Cairns's Act was passed, the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalizing wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict."

The other occurs in the judgment of Buckley J. in *Cowper* v. *Laidler* (2): "The Court has affirmed over and over again that the jurisdiction to give damages where it exists is not so to be used as in fact to enable the defendant to purchase from the plaintiff against his will his legal right to the easement."

These passages bring out very clearly the scope of the Act and the care taken to prevent abuse of its powers.

There is one other point upon which I ought to say a few words, and that is, the repeal of Lord Cairns's Act by a Statute Law Revision Act.

Lord Cairns's Act became law in 1858. Sect. 16 of the Judicature Act, 1873, vested in the High Court justices the jurisdiction which was vested in or capable of being exercised by the Courts of Chancery and the Courts of common law. All Courts of the Chancery Division acquired thereby the power of awarding damages, and they had, of course, the power of granting injunctions. In 1883 there was passed the statute 46 & 47 Vict. c. 49, being the Statute Law Revision and Civil Procedure Act, 1883, repealing Lord Cairns's Act, but

(1) [1895] 1 Ch. 287, 315-6. (2) [1903] 2 Ch. 337, 341.

H. L. (E.) 1924 — LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK. — Viscount Finlay.

with the proviso in s. 5 that the repeal should not affect any jurisdiction or principle or rule of law or equity established or confirmed by any enactment so repealed. The Statute Law Revision Act of 1898 (61 & 62 Vict. c. 22) repealed parts of that Act of 1883, including s. 5, and the repealing section of the Act of 1898 (s. 1) contains a proviso that the Act shall not affect any principle or rule of law or established jurisdiction, notwithstanding that the same might have been affirmed by or derived from any of the repealed enactments.

There has been a general consensus of opinion that Lord Cairns's Act, or something equivalent to it, has remained in force after the Statute Law Revision Repeal of 1883. It is a truism that a Statute Law Revision Repeal was never intended to alter the law, but merely to remove from the Statute Book enactments which were obsolete or unnecessary. The Repeal of 1883 must have proceeded on the view that Lord Cairns's Act was no longer necessary, and that its place had been taken by some equivalent provision. Baggallay L.J. in *Sayers* v. *Collyer* (1) took the view that notwithstanding the repeal in 1883 the substance of Lord Cairns's Act remained in force. He relied both on the proviso of the Statute Law Revision Act itself and on the Judicature Act as clothing the Court with jurisdiction, both as to injunction and as to damages. Lord Esher in *Chapman, Morsons & Co.* v. *Auckland Union* (2) rested his opinion to the same effect entirely on the view that the Judicature Act had given full powers, and therefore that Lord Cairns's Act had become unnecessary. Buckley J. in *Cowper* v. *Laidler* (3) was of the opinion that the jurisdiction of the Court under Lord Cairns's Act is preserved by the provisions of the Repealing Act itself notwithstanding the repeal.

In my opinion the view presented on behalf of both of the parties at your Lordships' Bar that the substance of Lord Cairns's Act remains in force in spite of the repeal is correct. For the purpose of arriving at this conclusion it is, I think, necessary to look at the combined effect of the Judicature

(1) 28 Ch. D. 103, 107-8. (2) 23 Q. B. D. 294, 299.
(3) [1903] 2 Ch. 337, 339.

Act, 1873, and the saving clauses in the Statute Law Revision Acts; for this purpose the saving clauses in the two repealing Acts are to the same effect. The Judicature Act conferred the power to award damages on the Courts of the Chancery Division and in estimating the damages the principles which Lord Cairns's Act laid down are still applicable by virtue of the saving clause in the Statute Law Revision Act. The Court, therefore, retains the power of awarding damages on the principles which I have stated in dealing with the terms of Lord Cairns's Act itself. The Act itself is now repealed, but the combined effect of s. 16 of the Judicature Act and the saving clause is that the law and practice on this point remain unaltered.

I think it unfortunate that Lord Cairns's Act was included in the Statute Law Revision Repeal of 1883, and suspect that it proceeded on some misapprehension, possibly the view that it conferred merely the right of giving damages as at common law. The repeal did not extend to Ireland, so that the Act still appears in the Revised Statutes, and all that has been gained by the repeal is that the expense of printing the few words in the statute which relate to England has been saved. Any person who uses the Revised Statutes may be a good deal puzzled by finding that the Act appears there as if it were an Irish statute. Lord Cairns's Act is one which is continually referred to, and will be continually referred to in English cases, as giving in a convenient form results which it might cost some effort and a good deal of time to work out afresh, and its absence from the Revised Statutes is to be regretted. Though the Act is gone, the law which it laid down still exists, and this case, like many others of the same kind, has throughout, from beginning to end, been dealt with on this view.

My Lords, I am authorized to state that my noble and learned friend, Lord Birkenhead, agrees with the judgment I have just delivered.

LORD DUNEDIN. My Lords, I cannot help remarking that I think the judgments in this appeal are in a peculiar position. On the question of construction of the statute all four judges

H. L. (E.) 1924 LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK. Lord Dunedin.

are—so far as their own opinions are concerned—of one mind that the jurisdiction in question is conferred by the words used. Romer J. considered that he was bound by the decision of the Court of Appeal in *Dreyfus' Case.* (1) Lord Blanesburgh, then Younger L.J., considered that the *Dreyfus* decision did not bind him, and would therefore have given effect to his own opinion. He was, however, out-voted by his two colleagues, who took up a position which personally I cannot quite appreciate. They said that *Dreyfus* did not bind them, but that the dicta in *Dreyfus* must be followed, and if wrong must be put right by a higher Court, that is, your Lordships' House.

My Lords, if a decision is binding, there is an end of it. But if you have only to do with dicta, though such dicta may well serve to help you to form your own opinion, I cannot see that they ought to overrule it. It is a different question when a practice follows on dicta. A practice it might not be right to disturb, but then it is the practice and not the dicta that forms the binding authority. Further, the present case seems to be the last in which such a course ought to be followed, because Lindley L.J., sitting in the Court of Appeal with A. L. Smith and Davey L.JJ., distinctly stated in *Martin* v. *Price* (2) that the question was still an open one.

In my view I respectfully think that the Master of the Rolls and Warrington L.J. ought not to have confined themselves to the question of whether the dicta in *Dreyfus* were carefully considered—their conclusion is one with which I cordially agree—but ought to have considered whether their own opinions or the dicta in *Dreyfus* were right, and if they thought that their view was right, to have said so and let a higher Court, if it was so minded, go back to *Dreyfus.*

My Lords, on the merits I think it necessary to say very little, for I have had an opportunity of carefully considering the judgment just delivered by my noble friend who has preceded me, and he has exactly expressed my views. The state of authority has been most carefully examined by

(1) 43 Ch. D. 316. (2) [1894] 1 Ch. 276.

Lord Blanesburgh in his judgment in the Court below. Put in a single sentence, my view is that the words "against the commission" clearly point to the inclusion of that state of circumstances which gives rise to an application quia timet; that the words "injured" and "damage" need not and should not be taken in the purely technical sense; that there is injury in a threat, and that damages in substitution for an injunction, once one holds that an injunction may be a quia timet injunction, clearly point to a pecuniary payment equalling the loss to be occasioned by the act against which, but for the provision in question, an injunction would have been obtained; and further I think there is no fear of abuse of the power in view of the authorities which Lord Finlay has quoted.

I therefore concur in the judgment proposed.

LORD SUMNER. My Lords, the question here is whether, when a wrong is apprehended but has not yet been committed, the High Court has jurisdiction to refuse an injunction and to award damages in lieu of it, or whether, until some wrong has been committed, its jurisdiction is limited to the grant or refusal of an injunction in order to prevent the commission of any wrong. The extent of the jurisdiction is to be determined by finding the meaning which the words of s. 2 of Lord Cairns's Act bore, on a true construction, prior to the formal repeal of that Act in 1883. There is no authority which binds your Lordships' judgment on this question, though there are numerous expressions of opinion and some decisions in the Courts below. As the question turns ultimately on the construction of the words, I apprehend that the best course is to consider them first and apart from authority.

The section, expressed in one sentence, falls into two parts. The second specifies the power newly conferred by the Act. The first states the class of cases within which the power may be exercised. Without in the least disregarding the importance of the first part of the section, I think that it is the language, which describes the newly-conferred power,

H. L. (E.) 1924 LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK. Lord Sumner.

that first demands attention. This power, a discretionary one, is to award (1.) damages, (2.) to the party injured, and this either in addition to or in substitution for an injunction. It would seem, therefore, to be only capable of being exercised where there is a party injured and where damages are capable of being assessed and awarded. What grounds are there for a contrary construction ?

To turn now to the first part of the section, which states the area for the exercise of the power. The cases, in which the power is exercisable, are all the cases in which, when the Act passed, injunctions could be granted or specific performance could be decreed, for I take it that breaches of contracts, agreements and covenants and injunctions against the commission or continuance of wrongful acts cover among them the whole field to which these remedies apply. I think, however, "all cases" must mean all cases in which the power as defined is applicable. So far as specific performance is concerned, they must always be cases where there has been an antecedent breach. No damages could be awarded, either in addition to or in substitution for any other remedy, where the right to be vindicated is a consensual one and has not yet been violated. It is, therefore, only in the case of injunctions against wrongful acts that any opportunity could arise for the exercise of this new power where the wrongful act is only apprehended and has not yet been committed. It is also fairly plain, that a very extensive and sufficient content is already given to the section, even though it be not carried so far as to include cases of applications for protection against apprehended wrongs. It may be true to say that, if the section is not carried so far, an important class of cases will be left outside of its operation; but it is not at any rate possible to say, that, without the inclusion of quia timet actions, the section would be an insignificant extension of the powers of the Court.

I think the appellants' main stress must be laid on the word "against." The expression "commission or continuance" certainly seems to differentiate that which is continuing from that which is not, and to cover by the word "commission"

something which is not yet completed. It does not follow that the word "commission" by itself will apply before anything is done at all. A tortfeasor commits a nuisance when he begins to do the act which constitutes the nuisance and not before, and an adequate content can be given to this expression by applying "commission" to something that is being done and "continuance" to failure to undo that which has been done. The words have, however, to be read in conjunction with the words "injunction against." So read I do not say that they cannot cover the case of a preventive application, quia timet, but they do no more than bring such cases within the possible field of the exercise of the power, where no actual wrong has begun when the proceedings commence. They cannot in themselves have the further effect of extending the words in which the power itself is conferred. Whether the power is exercisable in a quia timet action must depend on the latter part of the section.

Again, it is to be noted that the section endeavours to embrace in a single sentence many differing cases and subjects, and perhaps suffers from excessive compression. It includes contract and tort, specific performance and injunction, commission and continuance of wrongs. It does not follow that the power conferred applies equally and always to all these different things, or must always be applicable to every case. The words "intended or actual" after "commission" would have cleared up the ambiguity which otherwise exists, and they are certainly not words that can be implied.

The words which define the power, in my opinion, are neither apt nor adequate for the wide effect which is contended for. In a quia timet action there is no party injured at the commencement of the proceedings. It is just because he is not injured but frightened, that he sues at all. I know of no authority for saying that "injured" means aggrieved, and to say that injured includes "alarmed and aggrieved" is to beg the question. Again, until a wrong has been actually committed, to award a sum of money in substitution for an injunction is to fix the price at which a Court will license an intending tortfeasor to commit a wrong, to which the victim of it refuses

H. L. (E.) 1924 LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK. Lord Sumner.

to consent. It may have been right to confer on the Court of Chancery this novel power, but no word so unsuitable as "damages" could have been selected for the purpose. In such a case the defendant has so far done nothing at all, but, wishing to lay hands on what does not belong to him, may hope to find a Court of equity the most convenient place in which to effect his purpose. The succeeding words of the clause—"in addition to such injunction"—plainly mean, that the power to award damages in addition to an injunction is exercisable only when the wrong has been done already. Why should the words "in substitution for" have a wider scope? Damages "in addition" are real common law damages in the true meaning of the word. What warrant is there for construing the same word, when it is "in substitution," in some sense, which down to that time was unknown alike to Courts of common law and to Courts of equity? "To award damages to the party injured" are words perfectly apt to describe the power of compensating the person who has suffered a tort, but, to my mind, by no construction can they be made to mean power to award money to a person who has not suffered a tort. The past participle "injured" is the word used: it cannot also be made to include the future participle "about to be injured." That would be not construction, but reconstruction. The whole point of a preventive injunction is to forestall injury and, in such a case as the present, the truth is that the plaintiff is a party who is crying out, and quite rightly too, before he is hurt. He is doing so before any damage is done or any damages arise, simply in order to get protection against the commission of an anticipated act, which, if committed, will be unlawful. So far as these words go, they mean, according to their grammatical construction, a party who has suffered some injury and nothing else.

Next, the word "damages" means money compensation for wrong done. The term is a legal term of art, before 1858 inapplicable, so far as I know, to any jurisdiction in equity. It postulates the commission already accomplished of injuria cum damno, and it is the compensation, measured in money,

which a Court of law would award to the party, who had thus suffered damnum. The party injured must be a party injured by somebody or something. It may be "injured by the commission of the wrongful act" or "injured by the tortfeasor," whom the Court would restrain from such commissions in the future as well as order to pay damages for what he has already done, but beyond this construction cannot go. The words always remain inapplicable to the case of a party, who is not yet injured at all.

It is quite true that the jurisdiction, which has been exercised in fact in pursuance of s. 2, where damages are awarded in lieu of an injunction, has differed in two respects from the jurisdiction as to damages exercised in Courts of common law. For the purposes of the assessment, (1.) the injuries suffered by the plaintiff have been taken as at the date of the judgment of the Court, and not as at the commencement of the action only; and (2.) the sum awarded has been calculated so as to include the whole injurious effects both present and future, so as to be, in intention at any rate, a compensation once and for all for what has been actually done up to the date of the judgment with all its consequences. On the other hand, for damage actually done by the invasion of the plaintiff's rights, the Courts of common law would have awarded damages only in respect of damage suffered at and before the commencement of the action, leaving him to bring fresh actions for damage suffered thereafter. On this principle also they would have calculated the damages exclusive of anything attributable to subsequent prejudice to the plaintiff, arising after the commencement of the proceedings and not included in the action. Without suggesting any doubt, I express no opinion about these differences. After all they relate to procedure only; they cannot in any way affect the particular point now under consideration. The difference arises in each case from the construction of the words of the section, which has been adopted in the Chancery Division. Damages, it is said, which are in addition to or in substitution for an injunction, can only come into question when the time has arrived for the grant or the refusal of

H. L. (E.) 1924 LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK. Lord Sumner.

the injunction. For this purpose injunction means a perpetual injunction after the hearing, and not an interlocutory injunction granted merely to keep things in medio. Further, no money awarded in substitution can be justly awarded, unless it is at any rate designed to be a preferable equivalent for an injunction and therefore an adequate substitute for it, and this involves the necessity for taking the future as well as the past and the present into account so as to end matters once for all, instead of awarding damages only toties quoties, as was done in common law actions, leaving the injured party to bring as many further actions as there might be further separate torts: *Stokes* v. *City Offices Co.* (1), Lord Cranworth L.C.; *Fritz* v. *Hobson* (2), Fry J. Such questions can only arise after the statutory jurisdiction to award damages to the party injured has attached. If, on the true construction of the section, that jurisdiction attaches only when some party has been injured, so as to become entitled to some "damages," these questions do not affect that construction, but belong exclusively to the subsequent process of calculating the damages to be awarded. Right or wrong, the practice throws no light on the construction of the words, which determine the conditions under which any jurisdiction to give damages at all must arise.

If, however, the words of the enactment are not in themselves clear, as for my part I think they are, the next step is to consider the nature and scope of the whole Act, the state of the law existing when the Act passed, and the defects in it which the Act was designed to remedy. The Act from title and preamble to the last word of the last section is a procedure Act. It empowers the Court of Chancery to award damages in certain cases, to impanel juries and take verdicts and so forth. It has been repeatedly said, and especially in the years immediately following this enactment, that its object was to save the litigant from being harassed by the necessity for applying to two Courts for complete relief in respect of one wrong and from being "turned over," as the phrase was, by equity to law, if the case was not one for an injunction, or

(1) 13 L. T. 81. (2) 14 Ch. D. 542.

was a case for damages as well: *Ferguson* v. *Wilson* (1); *Davenport* v. *Rylands*. (2) The scheme of the Act abundantly bears out this account of its character and object.

Surely, my Lords, it would have been incongruous with such a scheme to create a power, which no Court theretofore had enjoyed at all, and to bestow it on the Court of Chancery alone. If the Legislature was really minded to do this, surely it would have done so in plain language. It would never have left its intention to be spelt out of a section, which, as to the greater part of its content, deals only with remedies for wrongs which have been committed, and on this construction of it, employs a technical term of the common law to express not only its recognized common law meaning, but a new and alien meaning altogether. Before 1858 the Court of Chancery sometimes said to a litigant, "Our jurisdiction to grant injunctions is a jurisdiction supplementary to that of the Courts of law. Injunctions are only granted where damages will not suffice. For you damages will suffice, if and whenever you are damaged at all—go to law." Sometimes the Court said: "We will grant an injunction in this case to restrain any further interference with your rights, but not a mandatory injunction to undo what has been done, for that would be oppressive. Damages will be enough for that: to get them go to law." For this mischief it was that s. 2 of the Act of 1858 was meant to provide a remedy. Was it meant to do more? To empower the Court of Chancery to refuse an anticipatory injunction and yet, where no wrong had actually been done, to award money, fixed as it thought fit, was not to improve procedure, but to confer a power, which in effect enabled the Court to fix the price at which an intending tortfeasor should be judicially licensed to violate the rights of another. This might be wise policy, but at any rate it was not a matter of mere procedure; as it happens, it was a thing which judges have repeatedly described in terms of not exaggerated disfavour: *Krehl* v. *Burrell*. (3) I think it is not unreasonable to say that, if the legislators of 1858 had meant as much as this,

(1) L. R. 2 Ch. 77, 88.
(2) (1865) L. R. 1 Eq. 302, 307.
(3) 7 Ch. D. 551, 554; 11 Ch. D. 146, 148.

H. L. (E.) 1924

LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK.

Lord Sumner.

the whole Act, and not merely s. 2, would have borne unmistakable evidence of their intention.

The theory on which the appellants have urged this view of the meaning of the Act, is that Parliament meant (1.) to enable the Court of Chancery to do what is called "complete justice" between the parties to the proceeding: *Elmore* v. *Pirrie* (1); *Hindley* v. *Emery* (2), and (2.) that "complete justice" involved the possession of this new power. The two propositions are distinct, and both seem to me to be assumptions. Sixty odd years ago the reform of procedure was, so to speak, in its infancy. Historically I think there is no ground for supposing that cautious reformers (a term which, I am sure, Sir Hugh Cairns would not have disowned) intended to do more than to put into one hand the remedies theretofore held in two. For my part I doubt, as Sir George Jessel doubted (3), whether it is complete justice to allow the big man, with his big building and his enhanced rateable value and his improvement of the neighbourhood, to have his way, and to solace the little man for his darkened and stuffy little house by giving him a cheque that he does not ask for. I think this kind of reasoning is really an argument for a modern amending Act, framed in accordance with the notions of 1924, not for a construction of this Act according to the words used in 1858.

In this view it is not necessary to decide whether the power conferred by the Act of 1858 was kept alive after its repeal in 1883 by the savings of the Statute Law Revision Act of that year and subsequently of 1898, or by the prior provisions of the Judicature Act, 1873, s. 16. In either case this may be truly said. The words of s. 2 were the title deeds of a wholly new jurisdiction, if the appellants' argument is sustained. I cannot, in that event, understand how the Legislature could have repealed it as a spent Act, whether its effect was continued by a procedure Act, as the Judicature Act was, or by omnibus savings, such as the Statute Law Revision Acts contained. If, on the other hand, the section only effected a

(1) (1887) 57 L. T. 333. (2) (1865) L. R. 1 Eq. 52, 54.
(3) 7 Ch. D. 554.

change in procedure by gathering into one hand powers previously held in the separate grasp of Chancery and of law, nothing was simpler than to recognize that by 1883 it was spent, and the question how it was to be kept alive, so as to negative any suggestion that its effect had been undone, was not a matter of real moment.

My Lords, I have not thought it necessary to deal at length with the numerous cases in which the existence of this wider power is sometimes recognized, but more often denied. To count the number of the learned judges who may be ranged on each side would be fruitless; to endeavour to compare or to weigh their reputations would, in me, be indecent. I think it is clear that the balance of judicial opinion has been in favour of the limited construction of the section, and that since 1889 there is no real authority for giving effect to it in its suggested wider form. I have done my best to form an independent opinion of my own, but I may now confess that I should differ with real trepidation from the opinion of Cotton, Bowen and Fry L.JJ., and from the assent which was afterwards given to it by Lords Lindley and Wrenbury.

I think that any injustice, such as Younger L.J. apprehended, if the respondent's contention should be upheld, can be very fully met in the way he suggests by making a declaration and adjourning the question of damages with liberty to either party to apply; but if more is needed, it is for the Legislature to supply it. My Lords, I think this appeal should be dismissed.

LORD CARSON. My Lords, I agree with the conclusion arrived at by my noble and learned friend Lord Sumner that this appeal should be dismissed. Romer J., who tried this case, has found that the buildings which the defendants propose to erect will, if erected, cause a nuisance or illegal obstruction to the plaintiff's ancient rights sufficient to give him a cause of action and to entitle him to relief. Prima facie, therefore, the plaintiff is entitled to an injunction to prevent such nuisance or illegal obstruction. No damage has yet been done, nor has the plaintiff been in any sense injured,

H. L. (E.) 1924

LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK.

Lord Carson.

but the learned judge has found that the interference with the plaintiff's legal right would be small and capable of being estimated in money, and that the plaintiff could be adequately compensated by damages if the Court had power to make an order for that purpose in lieu of granting an injunction. My Lords, it is said that the Chancery Procedure Amendment Act, 1858, commonly known as Lord Cairns's Act, gave such a power. It is not suggested that before the passing of that Act the Court had any power in the case of anticipated injury to refuse relief by injunction or to suggest to the parties threatened that there was any remedy at the common law side of the Courts. One would therefore expect to find in any Act giving a party a right to commit a trespass on condition of paying damages or compensation clear and unambiguous language making such a revolutionary change. When we turn, however, to the Act relied upon, we find it is entitled "an Act to amend the course of procedure in the High Court of Chancery," and as the Master of the Rolls says in his judgment in the present case, "the expression is in favour of the respondent's contention, for to give a right of action for damages to a person who has in fact suffered no injury, but has merely been threatened with one, is to give a new right of action and not merely to amend procedure." My Lords, I can find no words in the section relied upon which, in my opinion, could be construed to confer this "new right of action." "To award damages to the party injured" seems to me to refer and only to be capable of referring to a case where some legal wrong has been already committed. "Damages" is, of course, a legal term meaning "the recompense given by process of law to a person for the wrong that another has done him" (*see* Halsbury's Laws of England, Vol. 10, p. 302) and "a party injured" cannot in my view be held to describe a person who anticipates injury under certain circumstances, and is entitled by legal process to prevent it. I am aware, of course, that the words in the earlier part of the section, "against the commission of any wrongful act," are relied upon as entitling us to give a wider construction to the section; but in my opinion these words can and ought to be so construed

as to be applicable to an award of "damages to the party injured," and I agree with the view expressed by Lord Sumner "that an adequate content can be given to this expression by applying 'commission' to something which is being done." My Lords, the conclusion at which I have arrived is in accordance with the decision of Cotton, Bowen and Fry L.JJ. in *Dreyfus* v. *Peruvian Guano Co.* (1), decided as far back as 1889. It is not necessary to discuss the comments which have been made upon that case, so fully analysed by the Master of the Rolls, as your Lordships are all of opinion, I think, that it must be considered as the deliberate judgment of the learned Lords Justices. In the subsequent cases of *Shelfer* v. *City of London Electric Lighting Co.* (2) and *Cowper* v. *Laidler* (3) *Dreyfus* v. *Peruvian Guano Co.* (1) was treated as a binding authority, and I agree with Warrington L.J. when he says that "on the whole I cannot find that the opinions in question have been overruled in subsequent cases or that they were inconsistent with any decision in which the point was raised." I am of opinion, therefore, that as Romer J. was satisfied that the defendants were intending to commit what would amount to a legal wrong which if inflicted would involve damage, the respondent is entitled to maintain the injunction granted by the learned judge.

Hughes K.C. for the respondent, as to the form of the order, said that in the Court of Appeal the only question dealt with by the Court was the question of jurisdiction. That Court, though pressed by the respondent (the plaintiff) to do so, declined to hear the case on the merits, and it was still open to the respondent in the Court of Appeal to support on the merits the injunction granted by Romer J. He therefore suggested that the case should be remitted to the Court of Appeal to be heard on the merits and that the injunction should not be dissolved in the meantime.

Cunliffe K.C. for the appellants.

(1) 43 Ch. D. 316. (2) [1895] 1 Ch. 287.
(3) [1903] 2 Ch. 337.

H. L. (E.) 1924

LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. v. SLACK.

VISCOUNT FINLAY said that the case had better stand over till Friday, May 30, when Lord Birkenhead would be present. Possibly by that time counsel would be able to indicate some course in which both parties concurred.

1924. May 30. This case was again mentioned as to the form of the order, and the following order was made.

Order of the Court of Appeal reversed, and cause remitted back to the Court of Appeal, with a declaration that there is jurisdiction to award damages and a direction to do therein as shall be just and consistent with this judgment. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House.

Lords' Journals, May 30, 1924.

Solicitors for the appellants: *Jaques & Co., for Bointon, Son & Malcolm, Leeds.*

Solicitors for the respondent: *McKenna & Co., for Pettitt, Carter & Wade, Leeds.*

[HOUSE OF LORDS.]

ATTORNEY-GENERAL FOR IRELAND (AT THE RELATION OF COUNTY COUNCIL FOR COUNTY DOWN) AND OTHERS . . . . . } APPELLANTS;

AND

LAGAN NAVIGATION COMPANY . . RESPONDENTS.

H. L. (IR.)*
1924
May 30.

Highway—Repair—Bridge carrying Public Road over Canal—Collapse caused by ordinary Traffic—Liability of Canal Company—Standard of Repair—Change in Character and Volume of ordinary Traffic—6 & 7 Vict. c. civ., ss. 62, 63, 64, 65, 66.

By a special Act passed in 1843 a canal company was created to take over and manage a canal in Ireland, and the undertaking included a bridge constructed before the passing of the Act to carry a public road over the canal. This bridge had since been maintained by the canal company in a state of repair sufficient to carry the ordinary traffic of the district as existing at the date of the passing of the Act, but not sufficient to carry the ordinary traffic of the present day, owing to the increase in amount and the variation in character of such traffic, and as a consequence part of one of the retaining walls of the bridge collapsed. The road authority of the district claimed to recover from the canal company the expense of repairing the retaining wall.

The special Act, by s. 62, provided that the company should at all times during the continuance of the Act maintain and keep the navigation, and all bridges, sluices, drains, locks, weirs, banks, dams, roads, towing paths, and other ways belonging thereto, and all works, bridges, viaducts, preservation, retaining, and other walls, fences, and embankments upon or connected with all county or other roads made and constructed by the company, and all works to be thereafter executed for the improvement thereof, "in good and substantial and serviceable repair, and in an efficient state for all the purposes thereof, and of the traffic on the same respectively." The Act also provided that the several works, improvements, and repairs thereby required and authorized to be made should be executed to the satisfaction of the Commissioners of Public Works for Ireland, and empowered the Commissioners to require the performance of any repairs or works which they considered necessary:—

Held (by Viscount Finlay, Lord Atkinson, Lord Sumner and Lord Darling; Lord Blanesburgh dissenting), that, upon the true construction of s. 62, the only obligation imposed on the company was to maintain

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* *Present:* VISCOUNT FINLAY, LORD ATKINSON, LORD SUMNER, LORD BLANESBURGH, and LORD DARLING.

H. L. (Ir.)
1924
ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO.

the bridge in a state of repair sufficient for the ordinary traffic at the date of the passing of the Act.

Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. *Attorney-General* [1915] A. C. 654, and *Attorney-General* v. *Great Northern Ry. Co.* [1916] 2 A. C. 356 applied.

Decision of the Court of Appeal in Northern Ireland [1923] 1 I. R. 91 affirmed.

APPEAL from an order of the Court of Appeal in Northern Ireland (1), reversing a judgment of Wilson J.

The facts are stated in the opinion of Viscount Finlay and are summarized in the headnote.

The question raised by the appeal was whether the respondents, the Lagan Navigation Company—a company created by a special Act of 1843 (6 & 7 Vict. c. civ.) to take over and manage the Lagan Canal, which ran from Loch Neagh to Belfast—were bound to maintain a bridge known as Lady Bridge, which was constructed before the passing of the Act to carry a public road over the canal, in an efficient state of repair for the ordinary traffic thereon at the present day, or only for the ordinary traffic at the date of the passing of the Act, having regard to the increase in the volume and the change in the character of such traffic since the passing of the Act.

Wilson J. decided that the respondents were bound to keep the bridge fit for all the ordinary present-day traffic thereon, but the Court of Appeal in Northern Ireland (Denis Henry C.J. and Moore L.J.) reversed his decision, and held that the only obligation on the respondents was to keep the bridge in a state of repair sufficient for the ordinary traffic as it existed at the date of the passing of the Act.

1924. May 1, 2. *Fitzgibbon K.C.* and *E. S. Murphy K.C.* (with them *W. O. Hume*) (all of the Irish Bar) for the appellants. Assuming that the standard of repair prescribed by s. 62 of the special Act of 1843 in regard to works executed under the Act applies to this bridge (which the appellants deny), there is to be found in that section an obligation which was not to be found in either of the two cases relied on by the

(1) [1923] 1 I. R. 91.

Court of Appeal—*Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* (1) and *Attorney-General* v. *Great Northern Ry. Co.* (2)—to keep the bridge fit for the traffic of the day. Sect. 62 is in effect a statement of the common law liability: *Sevenoaks Ry. Co.* v. *London, Chatham and Dover Ry. Co.* (3)

J. B. Matthews K.C. and *Cartwright Sharp* (both of the English Bar) for the respondents. Sect. 62 draws no distinction as regards the liability to repair between newly constructed works and works in existence at the date of the Act. The traffic there referred to must be such traffic as the bridge was designed to bear. Traffic which has become ordinary traffic qua the road never could become ordinary traffic qua the bridge, which is a defined thing. "Repair" does not mean "reconstruction." The respondents are liable to maintain the particular bridge as it stands according to such a standard as it is capable of attaining; they are not liable to reconstruct the bridge. The cause of all the trouble is the change in the nature of the traffic. This case is governed by the *Sharpness Case* (1) and *Attorney-General* v. *Great Northern Ry. Co.* (2)

[They also referred to *Rex* v. *Inhabitants of Devon* (4); *Reg.* v. *East and West India Dock Co.* (5)]

Fitzgibbon K.C. replied.

The House took time for consideration.

1924. May 30. VISCOUNT FINLAY. My Lords, these proceedings were taken in the Chancery Division by the Attorney-General for Ireland at the relation of the County Council of the County of Down, and the County Council itself was joined as a co-plaintiff. The defendants are the Lagan Navigation Company, a company which was created by statute to own and manage a canal known as the Lagan Canal, which runs from Loch Neagh to the city of Belfast.

(1) [1915] A. C. 654, 669.
(2) [1916] 2 A. C. 356, 376, 380.
(3) (1879) 11 Ch. D. 625.
(4) (1825) 4 B. & C. 670, 676.
(5) (1888) 60 L. T. 232, 236.

H. L. (Ir.) 1924

ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO.

Viscount Finlay.

The case was tried before Wilson J. No evidence was called on either side, the following admissions of fact having been made :—

(1.) The bridge known as Lady Bridge and the retaining and other walls connected therewith were constructed prior to the passing of the Act, 6 & 7 Vict. c. civ. (Local).

(2.) The said bridge and also all retaining and other walls were at the date of their construction and at the date of the passing of the said Act adequate to carry the ordinary traffic of the district served thereby.

(3.) The ordinary traffic of said district has, since the construction of the said bridge and since the date of the passing of the said Act, increased in amount and varied in character, particularly as to motor traffic.

(4.) The said bridge, and also the retaining and other walls connected therewith, have been since their construction maintained in a good and sufficient state of repair adequate to carry the traffic of the said district as existing at the date of the passing of the said Act.

(5.) The said bridge, and also the retaining and other walls connected therewith, have for several years prior to the year 1919 not been adequate to carry the ordinary traffic over the county roads in the said district as increased and varied in character, particularly as to motor traffic, since the date of the said Act.

(6.) In the year 1919 portion of one of the retaining walls of the said bridge collapsed, and such collapse was caused by ordinary traffic, now greater in amount than, and varied in character, particularly as to motor traffic, from that prevailing at the date of the passing of the said Act."

And at the trial it was further agreed that the only questions to be decided were the following :—

" (*a*) Are the respondents bound to keep the bridge, known as Lady Bridge and referred to in the pleadings, and also all retaining and other walls, fences and embankments upon or connected with the county road passing over the said bridge, in good and substantial and serviceable repair for, and in an efficient state for, all the present day ordinary traffic thereon ; or

"(*b*) Are the respondents only bound to keep the said bridge and also all retaining and other walls, fences and embankments upon or connected with the said road in good and substantial repair for, and in an efficient state for, all the ordinary traffic at the date of the passing of the Act, 6 & 7 Vict. c. civ. ?"

On November 9, 1922, Wilson J. gave judgment in favour of the appellants, that the defendant company were bound to keep the bridge in repair for all the ordinary present day traffic thereon. But on appeal by the company, this decision was reversed by His Majesty's Court of Appeal in Northern Ireland, and the action dismissed, and it was declared that the defendants are not compellable to do more than maintain and keep the bridge in such good, substantial and serviceable repair as sufficed for the traffic thereon in the year 1843. Since 1843 motors have come into general use and there has been a great increase of traffic over the bridge. The question in the case is whether the burden of keeping up the bridge in a condition adequate for the traffic of the present day is to be borne by the company.

In dealing with this question not much help is, in my opinion, to be derived from the authorities. Two cases have been particularly referred to, the *Sharpness Case* (1) and the *Pickford Case* (*Attorney-General* v. *Great Northern Ry. Co.*) (2) Each of these cases was decided on the construction of the statute under which the bridge in question had been constructed, with the result that it was held that in neither case was there a liability to make provision for new and increased traffic beyond that with reference to which the bridge had been originally designed and built.

In like manner, for the purpose of deciding the present case, what we have to do is to consider the construction of the relevant statutes.

The company dates from 1843. The special Act is 6 & 7 Vict. c. civ. The bridge had been constructed long before the passing of this Act. The period of duration of the Act was expressed to be 31 years (s. 223), but by statute 51 & 52

(1) [1915] A. C. 654. (2) [1916] 2 A. C. 356.

H. L. (Ir.) 1924 — Attorney-General for Ireland v. Lagan Navigation Co. — Viscount Finlay.

Vict. c. cxxxvii. this was extended to 99 years. Sect. 62 of the Act provides that "the said company shall, at all times during the continuance of this Act, maintain and keep the said navigation, and every part thereof, and all bridges, sluices, drains, locks, weirs, banks, dams, roads, towing paths, and other ways belonging or appertaining thereto, and all works, bridges, viaducts, preservation, retaining, and other walls, fences, and embankments upon or connected with all county or other roads made and constructed by the said company, and all works to be hereafter executed for the improvement thereof, in good and substantial and serviceable repair, and in an efficient state for all the purposes thereof, and of the traffic on the same respectively."

Sect. 63 is also material: "63. And be it enacted, that the several works, improvements, and repairs hereby required and authorized to be made shall be performed and executed under the inspection and to the satisfaction of the Commissioners of Public Works in *Ireland* appointed under the authority of an Act passed in the session of the first and second years of the reign of His late Majesty King *William* the Fourth, intituled *An Act for the Extension and Promotion of Public Works in* Ireland; and that, before the commencement of such works and improvements as are hereby required and authorized to be executed between the passing of this Act and the First Day of August One Thousand eight hundred and forty-eight, the said company shall lay before the said Commissioners of Public Works copies of the plans, specifications, and estimates according to which it is intended to perform such works and improvements respectively."

Sect. 64 gave power to the Commissioners of Public Works to inspect the state of repair and efficiency of the said navigation and the said bridges, etc., belonging thereto.

Sect. 65 provides that the works are to be performed to the satisfaction of the Commissioners, and power is given to the Commissioners to require the performance of any repairs or works which they consider necessary.

Sect. 66 provides that if any difference arises as to the

manner in which such works, improvements and repairs are to be executed, the decision is to be left to an engineer to be appointed by the Treasury.

I cannot find anywhere in this Act any trace of a requirement that the bridge should be altered or rebuilt so as to be fit for traffic increased in amount and of a different kind from that which prevailed when it was constructed and when the Act 6 & 7 of Queen Victoria was passed. No distinction is drawn in the statute, and particularly not in s. 62, as regards upkeep, between the works which had been executed before 1843 and the works required to be executed in the statute of that year. The Commissioners had power to require any necessary works, and provision is made for arbitration in case of difference by an engineer to be nominated by the Treasury. It seems to me impossible to say that there is to be any difference in the standard of repair required for the old works as compared with those executed under the Act 6 & 7 Vict. They are all lumped together.

Wilson J. states his reasons for the conclusion at which he arrived as follows: "I was of opinion that the rule that local and private Acts of Parliament should be construed more strictly against the promoters, together with the express words of futurity in this action, put on the defendant company the obligation of maintaining and keeping this bridge in a serviceable state for the purposes (inter alia) of the traffic on the road carried by this bridge, and that on the true construction of this section such traffic could not be confined to the traffic on the road at the date of its construction by the defendants' predecessors or at the date of the passing of the Act of 1843, but must include the ordinary future traffic on the road from time to time, including the present-day ordinary traffic thereon." This paragraph appears to me to ignore the consideration of the effect of the provisions of the Act to which I have called attention, and on appeal it was reversed by the Court of Appeal, consisting of the Lord Chief Justice and Moore L.J. I desire to refer to two passages in the judgments of these

H. L. (Ir.) 1924

Attorney-General for Ireland v. Lagan Navigation Co.

Viscount Finlay.

two learned judges. (1) The first is in the judgment of the Lord Chief Justice: "In the present case the old bridges, of which 'Lady Bridge' was one, were vested in the canal company by the 6 & 7 Vict. c. civ., and the words of s. 62 as to repairs applicable to old bridges also apply to new works to be constructed by the company, with a provision in s. 63 that the several works, improvements and repairs hereby required and authorised to be made shall be performed and executed under the inspection and to the satisfaction of the Commissioners of Public Works in Ireland. The liability of the defendants depends on this statute. So far as new works are concerned it seems to be clear that they are within the decision in the *Sharpness Case* (2), and it is difficult to draw any distinction between the old and the new, which are covered by the same words in the same section.

The other passage is in the judgment of Moore L.J.: "No limitations on construction could, from the nature of things, be laid down for bridges already in esse. What creates or absolves from the liability to reconstruct is the form of the statutory obligation for 'maintenance.' Can it be said that without any differentiation in the language of the section the same words in the section are to be given different effects on the whole subject matter of works and bridges, the present or future property of the defendants, according to date of erection, though the statute does not say so? I think we cannot accept this view." These two passages from the judgment in the Court of Appeal in Northern Ireland state the grounds on which I desire to rest my decision. It appears to me that the terms of the statute exclude any liability to alter and, if necessary, rebuild the bridge as traffic increases and changes its character. Like all other cases of this kind the decision must rest upon the construction of the statute, and upon that it appears to me that the case for the appellants entirely fails.

Lord Atkinson. My Lords, I concur. The facts of this case have been so fully stated by my noble friend who has

(1) [1923] 1 I. R. 98, 102. (2) [1915] A. C. 654.

preceded me that it is quite unnecessary for me to repeat them at length. I will only refer to them so far as it is necessary to make what I am about to say intelligible. My noble friend has also stated what are the two questions which, it is agreed by the parties litigant, are in this litigation raised for decision.

The appellants expressly base their claim to have the decision appealed from overruled on the principle laid down by Lord Haldane in the dissenting judgment delivered by him in the case of *Attorney-General* v. *Great Northern Ry. Co.* (1) He stated in the following words what is this principle. "The principle is that where persons acting under statutory powers conferred on them for their own convenience interrupt a highway, they will, unless the statute provides otherwise, be presumed to be under an obligation to construct such works as will restore to the public the use of the highway and to maintain the works at their own expense in a condition adequate to the public need. When, under such circumstances, the public road which has been interrupted is restored by being carried over a bridge, the bridge, and the road which thus forms part of it, must be kept up to such a standard as will admit of the public enjoying the facilities for ordinary traffic over the road that they would have had if the interruption had not taken place and if the substituted works had not been executed."

This principle, he said, can of course be excluded if the Legislature thinks fit to do so in unambiguous words.

He then adopts the rule of law as stated by Lord Dunedin in the case of *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* (2), which is this, that if the statute which authorizes the works goes on to define what are to be the rights and obligations following from the execution of the statutory Act, it is in the language of the Legislature and that alone that rights and remedies are to be looked for.

I do not know whether Lord Haldane intended to lay down that the principle to which he refers must be expressly excluded

(1) [1916] 2 A. C. 356, 369. (2) [1915] A. C. 654.

H. L. (Ir.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO. Lord Atkinson.

by statute and cannot effectively be excluded by implication. If so, with all respect, I am unable to agree with him.

The statutory powers dealing with the bridge, the subject matter of litigation in that case, were conferred by a special Act, 25 Vict. c. xlvi., which incorporated the Railways Consolidation Act of 1845. Lord Haldane was, as I read his judgment, unable to find in these statutes any provision rendering the general principle he laid down inapplicable to the particular work under consideration. The five noble Lords who formed the majority of the House were apparently more fortunate. They succeeded in finding provisions in these statutes, especially in the forty-sixth section of the Railways Consolidation Act of 1845, which brought the case within the principle of the decision in the case, which may for convenience' sake be styled the *Sharpness Case*. (1) In my view, there are in the legislation applicable to the Lady Bridge, the subject matter of the present litigation, provisions which, reasonably construed, exclude the operation of the principle Lord Haldane laid down as applied to that structure.

Before dealing with these provisions I think it well to cite from the judgment of Lord Parker, delivered in the *Sharpness Case* (2), two or three short passages in which he deals with the nature and effect of this principle, with his accustomed clearness and accuracy. He said: "My Lords, since these bridges were built the traffic which may reasonably be expected to pass over the highways in question has become considerably heavier, by reason of the introduction of mechanical traction, and it is doubtful how far the bridges are of sufficient strength to bear this heavier traffic. The respondents contend that the company's obligation to maintain and support the bridges, and keep them in sufficient repair, involves an obligation to strengthen them as occasion may require, so that they will at all times be adequate to the ordinary traffic which may reasonably be expected to pass along the highways, however such traffic may increase in weight, and even though this obligation may involve pulling down and rebuilding the fabric itself. In my opinion this contention cannot be upheld. What

(1) [1915] A. C. 654. (2) [1915] A. C. 668, 669.

the company has to support, maintain, and keep in repair is in each case the fabric of the particular bridge, the size and strength of which were originally determined by the Commissioners appointed by the Act, and there is, I think, no principle of construction by which an obligation to maintain, support, and repair a particular fabric can be enlarged into an obligation to reconstruct or rebuild the fabric in such a way that it is materially different in strength, size or otherwise from the particular fabric the subject of the obligation."

Lower down, after alluding to the principle laid down by Fletcher Moulton L.J. (as he then was) in *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (1) and disapproving of it, he says: "It was contended that on this principle the company's obligations were not only those impressed by the Act, but included a common law obligation under which it was bound from time to time to construct and maintain such bridges as would afford the public the same facilities for traffic which would have been enjoyed if the canal had never been carried across the highways in question. For the reasons stated by the Lord Chancellor, I think this contention fails. It is one thing to rely on a common law principle where a statute is silent. It is quite another thing to invoke a common law principle in order to impose an obligation different from or in addition to the obligations which are defined by the statute as those subject to which a company may interfere with a highway."

It was, as I understood, practically admitted that this Lady Bridge was, as far as could now be ascertained, constructed in the year 1835, eight years before the passing of the 6 & 7 Vict. c. civ. It was not disputed that all the Acts earlier in date than the 6 & 7 Vict. c. civ. came to an end and ceased to be operative on December 25, 1835. The 54 Geo. 3, c. ccxxxi., was passed in the year 1813–14. It was only to continue in force for twenty-one years from December 25, 1814, that is, up to December 25, 1835: see s. 17. It would naturally follow from this that this bridge was built under the authority of this latter statute and not

(1) [1909] 2 K. B. 403.

H. L. (IR.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO. Lord Atkinson.

under the authority of the Irish statute passed in the year 1778–9, the 19 & 20 Geo. 3, c. 32 (Local).

Mr. Fitzgibbon, on behalf of the appellants, relied much upon the fact that the sixth section of the 54 Geo. 3 only provided that where a cut or canal made by virtue of this Act crossed any public road, the ascent to the bridge, to be made over this cut or canal for the purpose of the public road, should not be more than one foot in thirteen, and that the fence on each side of the said bridge should not be less than four feet above the surface of the bridge, and did not contain any provision as to the nature, dimension or structure of the bridge itself, and he pressed strongly that this omission distinguishes fundamentally this case from the *Sharpness Case*. (1)

I am by no means satisfied that Mr. Fitzgibbon was right in this contention. In the first section of this statute all the things which the company are by the Act authorized to do are set forth in general terms. First, they are empowered to repair, maintain, amend and uphold such works and other things as have been already erected made or done by virtue of the Acts recited or any of them, and second, they are empowered to make, erect, execute, do and perform all such works, matters and things as shall be requisite and convenient for making, completing and maintaining the several canals by the Act authorized to be made, and the navigation thereof, and for supplying the same with water, and making and completing and maintaining the several improvements and other works above mentioned according to the true intent and meaning of this Act and the recited Acts. It is clear that the making of bridges to carry public roads over canals which have been cut through those roads would be covered by the general words here used. Then s. 4 provides that maps and plans describing the lines of the canal, and the other improvements and works, and the lands through and within which the same are to be carried and made ; and books of reference, etc., have been deposited at the offices of the clerks of the peace for the respective counties through and within which

(1) [1915] A. C. 654.

the canals and other improvements and works are respectively to be made. Sect. 6, upon which Mr. Fitzgibbon so much relies, is merely the second proviso to s. 4, which deals with these maps and plans. The maps and plans mentioned have not been put in evidence in this case. They are not before the House, and in their absence it is, in my view, impossible to assume that they did not contain full and detailed description of the kind, nature and dimensions of the bridges which the company were bound to construct to carry over the canal the public roads which had been cut through by the canal.

In my view, however, the passing of the Act of 6 & 7 Vict. c. civ. forms a new point of departure in the scheme of the navigation of the Lagan. By that statute the whole situation appears to me to have been fundamentally changed, and on the principal parties concerned rights are conferred and obligations imposed quite different in nature, character and reach from those conferred or imposed upon them by the earlier enactments. From the preamble of this statute it appears that a large sum had been subscribed by several persons for the purpose of the navigation of the River Lagan; that these persons looked for repayment for their advances with 5 per cent. interest out of the tolls and other property of the corporation into which the lenders had been incorporated under the name of the Undertakers of the Lagan Navigation. These advances were not repaid, at least not in full. To secure the repayment of them it was essential that the navigation of the Lagan should be further improved, especially by the making of the basin and other new works in the said statute described. To carry out these works the persons who formerly made these advances, and all the other persons entitled to repayment of the sums due in respect of them, were incorporated under the name of the Lagan Navigation Company.

The second section of this Act deals with the transfer to and the vesting in the new company of the property of the old company the Undertakers. The Legislature did not content itself with enacting that all the property of the old company should vest in the new one, to be held and enjoyed by the

H. L. (Ir.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO. Lord Atkinson.

latter with the same powers, rights and privileges, and subject to the same obligations with and under which it was held and enjoyed by the former. Nothing of the kind. On the contrary, the language of the section clearly shows that its authors intended that the powers, privileges and obligations of the undertakers in reference to the property so transferred were in the hands of the new company to be modified.

The section begins by enacting (1.) that, "except as herein-after provided," all the lands, tenements and hereditaments and all bridges, sluices, drains, locks, weirs, banks, dams, roads, towing-path rights, privileges and advantages whatsoever which were before December 24, 1835, vested in the Undertakers by virtue of the earlier Acts, and (2.) all barges, boats, utensils, materials at any time heretofore provided and now used for the purposes of the said navigation; (3.) and all claims, titles, possessions of what nature or kind whatsoever "(save as herein-after provided)" which on December 24, 1835, were belonging or appertaining to the Undertakers in right of the navigation or otherwise, were thereby vested in the Navigation Company to hold the same unto and to the use of the latter company during the continuance of this Act. The transfers of the property under heads (1.) and (3.), if not indeed also that under head (2.), are expressly qualified by the words "save as herein-after provided." And the section proceeds to provide that the Lagan Navigation Company should thence-forth have in respect of, and for the purposes of the said navigation, all such powers (except as thereinafter provided) as on or before December 24, 1835, belonged to, or might rightfully have been exercised by the Undertakers in as full and ample a manner as same were possessed by the latter. The word "obligation" or "obligations" is not used from the beginning of the section, and every single important provision of it is qualified in the manner I have mentioned.

As supplemental to these provisions it is enacted in the fourth section that nothing in the Act is to revive any right, privilege or power formerly vested in the Undertakers which at any time before December 25, 1835, ceased and determined. The Legislature, having by the exception in the second section

removed all impediment in the way of the alteration of the rights, privileges and obligations of the parties concerned, proceeds to introduce those alterations.

By the twenty-first section the Commissioners of Public Works in Ireland are empowered to advance to the Lagan Navigation Company, and the latter are empowered to borrow, the sum of 12,000*l.* The security for this sum is the company's interest in the navigation and all the other premises thereby vested in them. The money is to be expended by the company in making such works and improvements as the company are by the Act required to make. Provision is made by the twenty-second section for the company's borrowing a further sum beyond the 12,000*l.* for the purpose of completing any works or improvements which shall have been partly performed (sic) by means of the expenditure of the 12,000*l.* or in making any other works for the improvement of the navigation. Sect. 24 provides that all the moneys which shall be borrowed by the company, except such sums as shall be required for draining some land mentioned, shall be expended by the company in performing (sic) and completing work for the improvement of the said navigation, and all such works shall be performed and completed respectively under the inspection and to the satisfaction of the Commissioners of Public Works in Ireland in such manner in all respects as is hereafter provided concerning the works and improvements hereby required to be made.

The principle on which the *Sharpness Case* (1) was decided would appear to me to apply directly to the work mentioned in this section. The sixtieth section provided that from August 1, 1847, the Navigation Company should, for the consideration named, pay to Her Majesty during the continuance of the Act a rent-charge of 300*l.* per annum, and the following section provides for three contingencies: (1.) that if a half-year's payment of this annuity be in arrear for three calendar months after the same has become due; (2.) that if the works or improvements or repairs hereby (i.e., by the Act) required and authorized to be made shall by any wilful

(1) [1915] A. C. 654.

H. L. (Ir.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO. Lord Atkinson.

neglect of the company not be executed within the time fixed by the Commissioners of Public Works or any two of them; or (3.) if the sum of 12,000*l.* shall by reason of any wilful act or neglect of the company not have been expended within five years from the date of the passing of the Act, then the Lords Commissioners of the Treasury may by the sheriff of the county of Antrim expel the company from the hereditaments and premises vested in them, and that from the time of the entry of the sheriff the interests of the company in the navigation, land, the hereditaments and premises, shall cease and be transferred to, and vested in Her Majesty, her heirs and successors, and the powers, clauses and provisos contained in the Act shall so far as they relate to the company cease and become utterly void.

It is not expressly stated what works are covered by the word "repairs" used in this section. It must, I think, cover anything covered by that word in the succeeding section—namely, s. 62. The provisions in this section are natural and proper if the rights and obligations of the company are to be determined solely by the provisions of this statute, but I do not see how the common law obligation said to rest upon the company can be reconciled with the express provisions of this section. For instance, if the traffic over the Lady Bridge increased in volume and in character so that it was absolutely necessary to reconstruct the bridge after the company had been evicted, who is to discharge the common law obligation?

Now s. 62, upon the construction of which this case is said to turn, is a proviso to the preceding s. 61. It begins with a provision dealing with the wilful neglect of the company by which its works are under the preceding section forfeited.

Next comes a composite clause, the provisions of the first part of which are plainly applicable to the works, bridges, sluices, drains, locks, weirs, banks, dams, roads, etc., executed and in existence before this statute was passed as they are to works of the same character to be thereafter constructed. Then comes a provision expressly dealing with new works. The words are "and all works to be hereafter executed for the

improvement thereof." The word "thereof" must refer at least to the works enumerated in the general clause preceded by the words "maintain and keep," which, I think, must be read in connection with the words "in good substantial and serviceable repair and in an efficient state for the purposes thereof and of the traffic on the same."

As I understood Mr. Fitzgibbon's argument, he contended that the obligations of the company as regards bridges and other works constructed under this Act of 1843 and by virtue of its provisions are to be determined by those provisions and by those alone; but that as to bridges and other works such as the Lady Bridge constructed before 1843, the obligations of the company are to be determined by the provisions of the statute plus the common law—with this result, that if the increase in weight, in volume, and vibrative effect of the traffic passing over the Lady Bridge rendered it necessary to rebuild the bridge to enable it to carry that traffic, the company would by virtue of the common law obligation be bound to rebuild it; but that if the Lady Bridge had been built in 1846 instead of 1835, the company would not, in the circumstances, have been obliged to rebuild it, as the company's obligations in that event would have been determined by the statute alone.

I did not understand Mr. Fitzgibbon to contend—I do not think he could have contended successfully—that the sixty-second section proprio vigore requires in the circumstances I have mentioned the rebuilding of the Lady Bridge. Their obligation under that section is to "*repair*" and to keep in good, substantial and serviceable repair the existing bridge, not another bridge which might be built as a substitute for the existing one, and the traffic referred to in the section is the traffic which is to be carried over the existing bridge, not over the substituted bridge.

I am quite unable to find in this statute any provision which differentiated in the manner suggested the obligation of the company in respect to bridges or other works executed before 1843 from those executed after that date. They are in s. 62 both placed upon the same level and both treated

H. L. (Ir.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO. Lord Atkinson.

alike. It is, I think, impossible to suppose that if the framers of the Act of 1843 desired to keep alive and perpetuate the distinction suggested, some provision would not have been found indicative of that intention. The group of sections comprising 63, 64, 65 and 66 appears to me to fortify the conclusion at which I have arrived, as well as to illustrate the position of domination and control over the undertaking and the works of the company in which the Commissioners of Public Works are put by this statute.

The sixty-third section enacts that the several works, improvements and repairs thereby required and authorized to be made (i.e., those mentioned in the preceding section possibly with others) shall be performed and executed under the inspection and to the satisfaction of the Commissioners of Public Works in Ireland, and that before the commencement of such works and improvements required and authorized to be made between the passing of the Act and August 1, 1848, the company are to lay before the Commissioners plans and specifications of the works. The sixty-fourth section provides that the Commissioners of Public Works and their surveyors are empowered at all times to survey and inspect the state of repairs of the bridges, sluices, drains, locks, etc., at all times during the progress of any of these works and improvements. The sixty-fifth section provides that if the plans, specifications and estimates required to be laid before the Commissioners are not so laid, or if laid are found not to be satisfactory to the Commissioners, or if the works and improvements required to be made are not made to the satisfaction of the Commissioners, or if at any time on any survey or inspection the Commissioners shall be of opinion that any repairs are necessary to be performed for the due and sufficient maintenance of the navigation and works, the Commissioners may by notice in writing require the company to lay before the Commissioners within such reasonable time as shall be fixed by this notice copies of the plans and specifications, and may also require the company to perform and execute such works and repairs in such manner respectively as shall be specified in the aforesaid notice.

By the sixty-sixth section it is provided that if any difference should at any time arise between the company and the Commissioners of Public Works as to the manner in which such works, improvements and "repairs" as are required to be made, or the necessity of any repairs which the company have been called upon to perform, the difference is to be settled by an appeal to the Lords Commissioners of the Treasury.

The sixty-seventh section gives to the company a similar right of appeal if they consider the works, improvements and repairs they are required by the Commissioners to make and execute are not necessary within the meaning of the Act or that such are beyond their means.

By these sections the Commissioners of Public Works are made, subject to these appeals, the absolute arbiters as to what works, improvements and repairs are needed and are to be made to maintain the navigation, and as to the manner in which they have been made and executed. If the company appeal to the Lords of the Treasury and fail, they are bound to carry out the works required by the Commissioners of Public Works in the manner and to the extent described. No distinction whatever is made depending on the age or nature of the works required to be made or repaired as to the source, nature or extent of the obligation resting on the company to have those works executed or repaired. The reasonable conclusions to be drawn from the numerous minute and drastic provisions of this statute of 1843 are, I think, first, that if the common law principle ever applied to this Lady Bridge, or other works, in a like position, its application has been impliedly, if not expressly, excluded by the provisions of this statute. Secondly, that the nature and extent of the obligation of the company to keep a bridge at or near the site of the Lady Bridge reasonably fit for the transit of ordinary traffic must be determined by the provisions of this statute and by those alone.

I think that those provisions do not impose upon the company an obligation to maintain at the side of the Lady Bridge a bridge adequate to provide safe transit for ordinary

H. L. (Ir.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO.

traffic if that traffic should increase in volume, and the weight and vibrative effect of the vehicles, to such an extent as to render reconstruction of the bridge necessary. In my opinion, therefore, the appeal fails, and should be dismissed with costs.

LORD SUMNER. My Lords, I concur.

LORD BLANESBURGH. My Lords, let me, at the outset, recall to your Lordships' attention the nature of the actual dispute out of which the present litigation originated. It has, I think, been somewhat lost sight of in the Court of Appeal and in much of the argument at the Bar of this House.

The action was a sequel to the expenditure of 557*l.* 9*s.* 7*d.* which the plaintiff Council as road authority had found it necessary to make in effecting certain works of reparation to a retaining wall of the Lady Bridge—a bridge originally constructed by the predecessors in title of the canal company to carry the public road over their canal. The claim of the Council in the action was to recover that amount from the canal company.

The damage to the retaining wall which the Council had made good and the cause to which it was attributable are thus described in the agreed statement of facts put in at the trial: "In the year 1919 portion of one of the retaining walls of the bridge collapsed and such collapse was caused by ordinary traffic now greater in amount than and [more] varied in character particularly as to motor traffic from that prevailing in 1843 the date of the passing of the canal company's Act, 6 & 7 Vict. c. civ."

In this statement the point in dispute is implicit only. It emerges, however, quite clearly in the terms of the two questions which, before the trial, the parties agreed were the only questions to be decided at the hearing. It is convenient to set these forth once again at this place.

1. Are the defendants bound to keep the bridge, known as Lady Bridge and referred to in the pleadings, and also

all retaining and other walls, fences, and embankments upon, or connected with, the county road passing over the said bridge, in good and substantial repair for, and in an efficient state for, all the present-day ordinary traffic thereon ? or

2. Are the defendants only bound to keep the said bridge and also all retaining and other walls, fences and embankments upon or connected with the said road in good and substantial repair for, and in an efficient state for, all the ordinary traffic at the date of the passing of the Act 6 & 7 Vict. c. civ. ?

It will be observed of these questions that the terms in which the canal company's obligations are described reproduce, without gloss of any kind, the relevant words of s. 62 of the company's statute of 1843 : that so far as any work to be done by the canal company is concerned, the obligation is expressed in the same terms in both questions ; and that question 2 is so phrased as to describe the *admitted* scope of that company's obligations. The only question propounded as being in dispute, is whether these obligations, in terms and character the same, are limited by the necessities of ordinary traffic, as it existed in the year 1843, or extend to the necessities of the ordinary traffic of the present day, or, as I would suggest as perhaps more apt, to these necessities "from time to time."

Now, my Lords, I cannot doubt that the parties acted advisedly in framing their questions as they did. The work done by the Council to the retaining wall of the bridge had not necessitated any kind of reconstruction of the bridge. The canal company were not denying liability on the ground that it had. There is, therefore, no reference in the questions to reconstruction. The work done had been within the words of the statute. To the words of the statute accordingly the questions are confined, the only issue thereby raised being as to the point or points of time to which, in relation to traffic, the obligations of that section are on its true construction referable.

And Wilson J., in answering the questions put to him,

H. L. (Ir.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO. Lord Blanesburgh.

confined himself within the limits thereby set. Nor am I sure, had the learned judges of the Court of Appeal adopted the same course, that they would have differed from him in his conclusion. But they went further afield. They allowed themselves to be influenced by other things than the actual meaning of the words used in s. 62. They imported into them considerations which seemed to them to emerge from the *Sharpness Case* (1) and *Pickford's Case* (2), thereby, as I think, incidentally omitting to pay sufficient regard to the direction of Lord Atkinson, given in the *Sharpness Case* (1) with reference to the corresponding enactment there in question: "One must look first, and I think I might almost say look last, at the provisions of the statute under which were built the bridges in reference to which the dispute arises. Upon those provisions, which are in themselves complete, the decision must depend." In my judgment, my Lords, as I hope I shall be able to show, that statement is entirely applicable to s. 62 of the Act of 1843 in the present case, and if I find myself at variance with the Court of Appeal, it is because, in my view, the learned judges there failed to appreciate fully its compelling force. The observations which I now propose to make, with reference to the law generally, upon this subject, and as to the true place filled in any accurate statement of it by the *Sharpness Case* (3) and *Pickford's Case* (4), are all directed to establish the soundness of that direction, as well as to gain every obtainable assistance in construing aright such a section as s. 62, with reference to the question upon it which the parties have here raised for judicial determination.

My Lords, the whole law on the subject is, I think, made clear by these two cases properly understood.

The common law obligations of such a company as this canal company is, in relation to the maintenance of a connecting link of public communication like the Lady Bridge, were treated by counsel on both sides as having been adequately summarized by Lord Haldane in the passage from his speech in *Pickford's Case* (4) already read by my

(1) [1915] A. C. 654, 666.
(2) [1916] 2 A. C. 356.
(3) [1915] A. C. 654, 669.
(4) [1916] 2 A. C. 356, 369.

noble friend. In view of some things said in the Court of Appeal it is, however, desirable, perhaps even necessary, to observe that the principles of the common law there enunciated as applicable to a bridge and the road which forms part of it apply just as much to a bridge constructed of a particular strength to the specification of an outside authority as to a bridge which, as in the present case, was one of those "by the company judged necessary." Whatever in this regard be the terms of the statute authorizing the construction of the bridge, the *common law* liability of the undertakers with reference to the structure is the same. "The bridge and the road which forms part of it" must be kept up to such a standard as will admit of the public "enjoying the facilities for ordinary traffic over the road that they would have had if the interruption had not taken place and if the substituted works had not been executed."

So much for the common law.

But, my Lords, another principle is made equally clear by these two cases, and that is that the common law liability of undertakers may be abridged or extended or excluded by the statute which confers or continues their powers, and if there are to be found in the statute provisions which on construction are held to be a complete statement of the undertaker's liability, these provisions form a code on the subject and cannot be added to by what has been called the common law doctrine, or in any other way.

The problem in the present case is accordingly very simple so far as statement is concerned. If the first question has to be answered in accordance with that common law doctrine, the answer must clearly be in the affirmative. If it has to be answered in accordance with the provisions of the statute in whose terms it is expressed, then the answer must be found in the proper interpretation of these provisions and of them alone.

Now, my Lords, I am in complete agreement with, I believe, all your Lordships in thinking that the whole liability of the canal company, so far as the present claim is concerned, is to

H. L. (Ir.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO. Lord Blanesburgh.

be found in s. 62 of the Act of 1843. The common law liability, although some of it at any rate may there be reproduced, is, as such, I think, excluded by that section. I am clear also that the section properly construed extends to all the bridges and works of the company there defined, whether at that time constructed or by the statute contemplated and thereby authorized. And of the bridges of the latter class it is true to say that they are all to be erected to the approval of the Commissioners of Public Works: in other words, they are, in that respect, in like case with the bridges in question in the *Sharpness Case* (1) and in *Pickford's Case.* (2) That is the fact, and due, but not undue, weight must be given to it. For, my Lords, the judgments of the Court of Appeal satisfy my mind that if error is to be avoided it is just at this point that the precise meaning of the *Sharpness Case* (1) and *Pickford's Case* (2) must be ascertained. Otherwise, in their relation to the present case, they will be accorded a position to which they have no claim.

In the *Sharpness Case* (1) the company, a canal company, were under a statute of 1812 empowered to construct a canal, and were required to make and from time to time maintain and support such bridges and the like as certain Commissioners should determine, and it was enacted that the company should not "make the said canal . . . . across any common highway . . . . until they shall . . . . have made and perfected such bridges . . . . across such highway . . . . and of such dimensions, and in such manner, as the said Commissioners shall adjudge proper; and *all such . . . . bridges* . . . . to be made shall, from time to time, be supported, maintained, and kept in sufficient repair, by the said company."

That was all. Since the passing of the Act in 1812 ordinary traffic which might be expected to pass along the highway and across the bridges had become materially heavier, and of that traffic there was some which the bridges would not bear unless they were reconstructed. The question was whether the statute had imposed an obligation to reconstruct the

(1) [1915] A. C. 654. (2) [1916] 2 A. C. 356.

bridges from time to time so as to bear traffic which though ordinary was progressively including heavier vehicles.

This House held that there was no such obligation.

That section, says Lord Haldane (1), referring to the section I have just abstracted, "contains a set of provisions which appear on their face to be intended as exhaustive. Under these circumstances I see no reason for departing from, or adding to, the natural meaning of the language."

And in another passage he says: "What are to be kept in sufficient repair mean such bridges as were approved by the Commissioners. . . . . This language . . . . prescribes unambiguously the extent of the obligation to keep in repair. It appears to me to stop short of imposing on the appellants an obligation to reconstruct so as to provide bridges of a standard higher than that which the Commissioners have prescribed."

All the other noble Lords present agreed, Lord Parker and Lord Parmoor, however, being assisted to their conclusion by the absence from the section then in question of a feature which is the essential characteristic of the section with which in the present case we have to do.

"The standard," says Lord Parker (2), "by which the obligation is to be judged is neither the ordinary traffic when the canal was constructed nor the ordinary traffic of to-day, but the bridge itself as determined by the Commissioners under the Act."

"It appears to be quite clear," said Lord Parmoor (3), "that the standard of support, maintenance, or repair is fixed, not in relation to the changing conditions of traffic, but to the character and strength of the structure as ordered and approved by the Commissioners."

And it is very material for the purposes of the present case to observe, that the House, emphasizing this point, gave effect to the absence of that standard, by varying the declaration which had been made by Phillimore J., whose order in other respects was restored. That learned judge had declared that the appellants were liable to maintain

(1) [1915] A. C. 661, 662. (2) [1915] A. C. 669.
(3) [1915] A. C. 671.

H. L. (Ir.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO. Lord Blanesburgh.

and keep in repair the bridges to bear such traffic as was ordinary and might reasonably have been expected to pass upon the highways serving the said bridges at the time of the making of the bridges. For that the House substituted the declaration that as to each bridge the obligation of the company was to support, maintain and keep it in repair "in the condition in which it was made and perfected in accordance with the adjudication of the Commissioners."

I pause here to observe that such a declaration has not been made and could not be made in the present case with reference to any bridge of the canal company. The reference in s. 62 of the present Act to the requirements of traffic is an effective bar to any such declaration. Strangely enough, however, it has not been noticed that, slight in words as the divergence from the *Sharpness* declaration appears to be, the declaration actually made by the Court of Appeal, avowedly following the *Sharpness* and *Pickford* declaration, necessarily involves a complete departure from the principle on which each of these declarations was made and by the terms of the section then in question was justified. I return, however, to this aspect of the matter later.

Pickford's Case (1) is to the same effect as the *Sharpness Case.* (2)

The bridge there, which was a bridge over a railway, was constructed under the provisions of s. 46 of the Railway Clauses Consolidation Act, 1845. That section provides that if a line of railway cross any turnpike road or public highway, then the road may be "carried over the railway . . . . by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and *such bridge* . . . . shall be executed and at all times thereafter maintained at the expense of the company."

As originally constructed between 1862 and 1867, the bridge in question complied with the statutory requirements relating thereto. Before the railway was opened the Board of Trade inspector reported that all bridges were substantially built and of sufficient strength. But as so constructed the bridge was not adequate in strength to bear heavy motor

(1) [1916] 2 A. C. 356. (2) [1915] A. C. 654.

traffic which, in 1912, Messrs. Pickford desired to use it for. The substantial question accordingly was whether the railway company were bound to strengthen the bridge to carry such traffic. The railway company contended that, as in the *Sharpness Case* (1), the section then in question imposed upon the company an obligation to construct a particular thing, at a particular time, and an obligation at all times thereafter to repair and maintain that particular thing and no more. The House, Lord Haldane on this occasion dissenting, took that view.

In that case as well a reference was made to the same circumstance that had attracted the attention of Lord Parker and Lord Parmoor in the *Sharpness Case.* (1)

"There is," said Lord Shaw (2), "nowhere in the statute any obligation, so far as can be discovered, with regard to the increase of the strength of the bridge according to future traffic requirements"—indicating quite clearly that if there had been, his decision, to say the least, might have been entirely different. The noble Lord also recognized the possible public inconvenience of the decision at which on the words of the statute he had felt constrained to arrive.

"I may add," he says, "that the fact that the judgment of this House is to that effect makes the situation with regard to the accommodation of the road traffic of the country, and the possible serious interruption thereof, one for the attention of the Legislature."

Now, my Lords, I have analysed these cases, I fear, tediously. My excuse must be that the learned judges of the Court of Appeal have, as I very respectfully think, misunderstood them. These cases certainly neither of them decided, as seems to have been supposed in the Court of Appeal, that the standard of obligation with reference to the maintenance of a bridge carrying a highway over a canal or railway and erected according to a specified standard is necessarily or naturally under a statute any more than it is at common law different from the standard applicable to a bridge the details of which are left to the undertakers themselves to fix.

(1) [1915] A. C. 654. (2) [1916] 2 A. C. 376, 377.

H. L. (Ir.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO. Lord Blanesburgh.

That the standard for all bridges should be the common law standard was indeed in both cases strongly contended. And the contention had at least the merits of plausibility and convenience.

"When the Act," said Lord Loreburn in *Pickford's Case* (1), "imposes a duty of repairing the newly-made road you would naturally, though not necessarily, expect the new authority to be invested with the same obligations as its predecessor."

That view, however, must not be stressed.

"The burden may be made heavier or lighter. I see no presumption of law either way."

And a little earlier he had said: "The Act speaks for itself, and the law does not, I think, attach to its construction any rule beyond the ordinary canons of construction."

All therefore that the House in either case held was that the only relevant obligation laid upon the undertakers by the maintenance section then in question was to maintain their actual bridge according to the strength of its original construction as authorized. The House so decided, not because that conclusion seemed to the noble Lords to be a priori obvious or presumptively inevitable or even convenient. They were conscious of its inconvenience; to Lord Loreburn another view would have seemed natural, and Lord Haldane, who took a leading part in advising the House to adopt it in view of the section in the *Sharpness Case* (2), was unable to find sufficient warrant for it in the section in question in *Pickford's Case.* (3) In both cases the House as a whole decided as it did merely because in its view the terms of the maintenance clause in each of the two statutes in question were unambiguous and comprehensive and referred to a definite ascertained structure, and because the liabilities of the company were not in either case to be extended beyond the terms of the clause. These decisions accordingly, as I very respectfully submit to your Lordships, can only be of direct assistance in the present case to the extent to which

(1) [1916] 2 A. C. 356, 367. (2) [1915] A. C. 654.
(3) [1916] 2 A. C. 356, 370.

on examination it appears that either of the sections then in question—the terms of each I have above set forth—is in principle, substance or form the equivalent in meaning of s. 62 of the respondents' Act of 1843. They cannot properly be allowed, as I think, further to influence the decision of this appeal. As Lord Haldane, in *Pickford's Case* (1), said of the *Sharpness Case* (2), in words the correctness of which is not, I should suppose, to be gainsaid: "In interpreting other words in another statute such a judgment can render no more assistance than that which is derived by a Court which has to construe a will of personal estate from decisions on other and differently worded wills." So far, therefore, the conclusion of the whole matter as I see it is that in the present case the question between the parties turns entirely upon the true construction of s. 62 of the canal company's Act; that that inquiry must proceed upon the finding already made that the section deals, and in the same form of words, with bridges and retaining walls, whether then existing or thereafter to be constructed—that is to say, both with bridges built like the Lady Bridge—as the Undertakers themselves had "judged necessary" and with bridges to be built to the specification of an outside body of Commissioners; but further, on the authority of the *Sharpness* and *Pickford* cases, that the inquiry proceeds also upon this canon—that as to bridges of either class the effect of the section depends entirely upon the true meaning of the language employed, ascertained without any presumption operative in either case in any direction.

The provisions of s. 62 are under your Lordships' notice. With regard to them the first observation I would make is that in that section you at length have that which was looked for but not found in either *Sharpness* or *Pickford*—a standard of obligation fixed—to take for convenience of statement the case of bridges—with reference to two things: 1st. Efficiency for all purposes of a bridge. 2nd. Efficiency for all the purposes of the traffic thereon. The effect of this alteration in standard from that employed in either *Sharpness*

(1) [1916] 2 A. C. 356, 370. (2) [1915] A. C. 654.

H. L. (IR.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO. Lord Blanesburgh.

or *Pickford* is radical. The obligation is no longer to maintain a bridge as constructed and authorized; no particular structure is now either the measure of the company's liability or, indeed, directly relevant to it. The obligation under this section, if the date of completion of the structure is to be the governing date, is to maintain a bridge of a strength sufficient for the traffic thereon at that date, however inappropriate for that purpose, however either superfluous or inadequate may then have been the strength of the bridge to meet it. It is now of no advantage to the public under this form of clause as so construed, differing entirely in this respect from the form of clause in *Sharpness* and *Pickford*, that the Commissioners, looking to the future, had specified for a bridge adequate for the requirements of the future. The clause so read does not oblige the company to maintain the bridge at that strength if the traffic upon it at the date fixed did not require such a bridge. In other words that which in *Sharpness* and *Pickford* was the only standard—the strength of the bridge as authorized—is now quite irrelevant as a measure of maintenance liability.

Accordingly the construction placed in these cases on sections in principle so different from that with which we have here to do may be in the present case a snare, but it can, I think, be no guide. What then is the obligation imposed upon the canal company by s. 62 as it stands? It is "at all times during the continuance of the Act to maintain and keep . . . . the bridges and retaining walls . . . . in good and substantial and serviceable repair and in an efficient state for all purposes of the same and of the traffic on the same."

To my mind the meaning of these words is not obscure. The obligation is *at all times* to have the bridges and retaining walls in serviceable repair and in an efficient state for all purposes thereof and of the traffic thereon *at the same times*, and not at some past time ascertained if ascertainable at all in the case of then existing bridges as in 1843 and in the case of each future bridge as at the date of its opening.

Such is the obligation which appears to me to be naturally imposed by the language merely as it stands. I do not myself

see how the alternative construction adopted by the Court of Appeal is, as a matter of words, even admissible. But one may go further. The words so read import only such an obligation as Lord Loreburn says you would naturally expect to find in such a connection, while as so defined the obligation is little more than a paraphrase of that which the common law itself would have imposed had there been no provision in the Act on the subject, while, as one would expect of an arrangement with such an inspiration, it is both convenient and eminently fair as between the Undertakers and the public. Why then should it not have effect? My Lords, with all respect for the opinion of others, I cannot myself see.

There was, however, one point on the section referred to in the course of the argument which seemed to militate against the reasonableness of that construction. A reference to the section will show that it imposes upon the canal company the same obligation with reference to the "navigation and every part thereof" that it does with reference to bridges and other works, and it was asked whether the section was to be read as imposing upon the company a continuous statutory obligation to keep its canal efficient for the passage of steam or other large vessels—as evolved from time to time. It was pointed out in answer to that difficulty that against such a burden the company might probably protect itself by suitable by-laws. I find, however, that the company is provided with an even more efficient protection than that. It appears from the company's Act of 1873 that the Undertakers were not up to that date treated by the Legislature as having power to use steam vessels on the canal at all, and provision is made in that Act for the use of the canal by such vessels on conditions which effectually prevent them from becoming a menace to the stability of the structure. I think, therefore, that this consideration does not militate against the construction which, as it seems to me, the words naturally bear.

But does that construction involve the company in the possible liability of having to reconstruct any of its bridges? In answer, I would say that while that question, as I think, in no way arises for decision now, my own view upon it is that under this form of clause reconstruction as a separate

H. L. (Ir.) 1924 ATTORNEY-GENERAL FOR IRELAND v. LAGAN NAVIGATION CO. Lord Blanesburgh.

head of liability never arises. The bridge has to be kept efficient for certain purposes of traffic. If it can only by reconstruction be kept so efficient, then reconstructed it must be. But not otherwise. Such is the common law obligation with reference to all such bridges, and it is, I think, here reproduced. The obligation may be greater in degree on one construction of the clause than on another. But it is the same in kind whatever that construction may be.

For these reasons, my Lords, I am of opinion that the questions in this case should be answered as Wilson J. answered them. But on grounds which I have already sufficiently indicated, I would vary his declaration by substituting for the words " all the present day ordinary traffic thereon " the words " all the ordinary traffic thereon from time to time."

With that variation in his decree I am for restoring it and allowing this appeal.

Lord Darling. My Lords, I agree with the conclusions of the noble and learned Lords who have expressed the opinion that this appeal should be dismissed. It appears to me that to decide in favour of the appellants would be to declare that the words of the statute " maintain and keep in repair " are exactly equivalent to *remove and reconstruct, on other principles applicable to bridge building,* as and whenever the road traffic should change in character. This is so forced an interpretation that I cannot imagine that it expresses the intention of those who framed the statute in question, and the exact words of a speech or a statute are merely a means of expressing the intention of men who select and use those words when others are at their service, and their choice. I come to the conclusion therefore that this appeal should fail.

Order of the Court of Appeal in Northern Ireland affirmed, and appeal dismissed with costs.

Lords' Journals, May 30, 1924.

Solicitors for the appellants: *Sherwood & Co., for R. J. Dickson, Belfast.*

Solicitors for the respondents: *H. H. Wells & Sons, for White, McMillan & Wheeler, Belfast.*

[HOUSE OF LORDS.]

MAYOR, &c., OF SOUTHPORT . . . APPELLANTS; AND ATTORNEY-GENERAL AND OTHERS . . RESPONDENTS.

H. L. (E.)*
1924
May 30.

Electricity—Supply—Tramways worked by Electricity—Agreement between Urban District Council and Electric Supply Company—Incorporation of Urban District with Borough—Supply of Electricity by Borough Council for working Tramways in former Urban District—Electric Lighting Act, 1909 (9 *Edw.* 7, *c.* 34), *s.* 23.

By s. 23 of the Electric Lighting Act, 1909: "Where in any area a local authority, company, or person is authorised to supply electricity under Act of Parliament or under licence or Provisional Order granted under the Electric Lighting Acts, it shall not, after the passing of this Act, be lawful for any other local authority, company, or person to commence to supply or distribute electricity within the same area unless such supply or distribution is authorised by Act of Parliament, or by licence or Provisional Order granted in terms of the Electric Lighting Acts: Provided that this section shall not prevent any company or person from affording a supply of electrical energy to any other company or person where the business of the company or person affording the supply is not primarily that of the supply of electrical energy to consumers . . . ."

In 1901 an urban council, being authorized by an Electric Lighting Order to supply electrical energy within their district, transferred their powers under the Order to an electric supply company on the terms that the company should generate all electrical energy required for public and private lighting and for working tramways in the district, and the council agreed not to consent to the supply of electrical energy by any other corporation, company or person in the district. The tramways of the district formed one continuous line with the electric tramways belonging to an adjoining borough. By an Extension Order of 1911 the urban district was incorporated with the borough and the borough corporation was substituted for the urban council, but all contracts entered into by or with the council were to remain in force against or in favour of the corporation. In 1921 the corporation ceased to take electrical energy for the tramways of the added area from the supply company and themselves provided the electrical energy for the whole of the borough tramways:—

Held (by Viscount Cave, Lord Dunedin, Lord Atkinson, and Lord Shaw of Dunfermline; Lord Sumner dissenting), that the provision of electrical energy by the corporation for tramways worked by themselves was a "supply" within the meaning of s. 23 of the Electric Lighting

* *Present:* VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

H. L. (E.)
1924
SOUTHPORT CORPORATION v. ATTORNEY-GENERAL.

Act, 1909, and that the corporation were acting in violation of the section.

Held, further (by Viscount Cave and Lord Shaw of Dunfermline), that the agreement of 1901, as preserved by the Extension Order of 1911, prohibited the corporation from themselves providing electrical energy in competition with the supply company.

Dictum of North J. in *West Surrey Water Co.* v. *Guardians of Chertsey Union* [1894] 3 Ch. 513 not followed.

Decision of the Court of Appeal [1923] 1 Ch. 548 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Eve J.

The action was brought by the respondent, the Attorney-General, at the relation of the respondents, the Birkdale District Electric Supply Company, and by the company, against the appellants, the Corporation of Southport, for a declaration that the appellants were not authorized or entitled to generate for supply or distribution, or to supply or distribute, within the area formerly the urban district of Birkdale, electrical energy for any public or private purposes whatsoever, including the lighting of public lamps in the streets and town hall buildings and the working of any of the electric tramways in such area, and for an injunction restraining them from so doing.

The facts are fully stated in the report of the case before the Court of Appeal and also in the opinion of Viscount Cave, and are summarized in the headnote.

Eve J. held, solely on the authority of *West Surrey Water Co.* v. *Guardians of Chertsey Union* (2), that the appellants in providing electricity for the working of their own tramways were not "supplying" electricity within the meaning of s. 23 of the Electric Lighting Act, 1909, or of the agreement mentioned in the headnote, and dismissed the action.

The Court of Appeal (Lord Sterndale M.R., Warrington and Younger L.JJ.) reversed this judgment, and made a declaration in the terms of the claim.

1924. April 7, 8, 10. *Upjohn K.C.* (with him *Bischoff*) for the appellants. The appellants are empowered to work all their tramways whether within or without the borough by

(1) [1923] 1 Ch. 548. (2) [1894] 3 Ch. 513.

electricity: Southport Extension and Tramways Act, 1900, s. 42. The respondents rely, first, on cl. 8 of the supplemental agreement of December 31, 1901, and, secondly, on s. 23 of the Electric Lighting Act, 1909, as preventing the appellants from providing electricity for their tramways in the added area. As to 1: Clause 8 has no application to a local authority using its own electric current to work its tramways in the Birkdale area. A local authority using its electrical energy for its own purposes is not consenting to the supply of electrical energy by some one else within the meaning of the clause. As to 2: Sect. 23 of the Electric Lighting Act, 1909, was aimed at preventing unauthorized undertakers from competing with authorized undertakers, and the word "supply" is there used in the sense of making delivery to third parties and not in the sense of consumption by the local authority itself. The complaint is not that the appellants are competing with the respondent company, but that they are customers of the company and ought to pay. Assuming that "supply" extends to the user complained of, the appellants come within the exception in the section.

[He referred to *West Surrey Water Co.* v. *Guardians of Chertsey Union* (1); *Finchley Electric Light Co.* v. *Finchley Urban Council* (2); *Rhodes* v. *Forwood* (3); Will's Electric Lighting, Power and Traction, 4th ed., p. 243.]

Maugham K.C. (with him *A. Guest Mathews*) for the respondents. As to cl. 8: Doing an act oneself is something more than consenting to an act by somebody and is an obvious derogation from the grant. On the true construction of the clause the appellants cannot consent to the supply by themselves of electrical energy within the Birkdale area.

As to s. 23 of the Electric Lighting Act, 1909, "supply" is there used in the general sense in which it is used in all the Electric Lighting Acts—namely, as equivalent to provide. The words of the section are "supply or distribute," and if "supply" is limited to supplying third parties the word "distribute" becomes otiose. The section is not considering

(1) [1894] 3 Ch. 513. (2) [1903] 1 Ch. 437.
(3) (1876) 1 App. Cas. 256, 262.

H. L. (E.) 1924

SOUTHPORT CORPORATION v. ATTORNEY-GENERAL.

a purely private generation of electricity, and accordingly a man might light his own house by electricity and provide a dynamo for that purpose without infringing the section; but it is considering a supply as a business undertaking, though not necessarily an undertaking conducted for profit. The section is aimed at the prohibition of such a supply of electricity as would naturally be the subject of a Provisional Order or an Act of Parliament. The appellants do not fall within the exception in the section, because they are not authorized either by Act of Parliament or by any Provisional Order or licence to supply electricity in the Birkdale area.

Upjohn K.C. replied.

The House took time for consideration.

1924. May 30. VISCOUNT CAVE. My Lords, this is an appeal by the Corporation of the county borough of Southport against an order of the Court of Appeal in England whereby it was declared that the appellant Corporation is not authorized or entitled to supply or distribute within the area formerly the urban district of Birkdale electrical energy for any public or private purposes whatsoever, including the lighting of public lamps in the streets and the town hall buildings and the working of any of the electric tramways in such area, or to expend any part of the borough fund or proceeds of the borough rate or any other money of the appellants or the borough for the purpose aforesaid, and an inquiry was ordered as to damages.

By the Birkdale Electric Lighting Order, 1898 (which was duly confirmed by Parliament), the Birkdale Urban District Council (whom I will refer to as "the Council") were empowered to supply electrical energy within the urban district of Birkdale for all public and private purposes as defined by the Electric Lighting Act, 1882. By the Birkdale Urban District Council Tramway Order, 1901 (which was confirmed by Parliament on August 9, 1901), the Council were empowered to work certain tramways in their district by electric power. By an indenture dated December 31,

1901, the Council, with the consent of the Board of Trade, transferred their electric lighting undertaking to the respondents, the Birkdale Electric Supply Company, Ld. (whom I will refer to as "the supply company"), upon terms which bound the supply company on the requisition of the Council to lay distributing mains and supply electrical energy to the public lamps, and which reserved to the Council certain rights of control and a right after fourteen years to repurchase the undertaking upon specified terms. By a second indenture of the same date it was agreed between the Council and the supply company that the supply company should take a lease of certain land of the Council for the erection of a generating station, and should generate within the urban district of Birkdale all electrical energy required for public and private lighting under the Order of 1898 and for working any electrical tramways "owned by them" in the same district, and should supply electrical energy at prices which were specified. This indenture contained the following clause: "8. The Council shall not so long as the powers duties liabilities and works authorised by the Order are vested in the company apply for any Act Provisional Order or licence under the Electric Lighting Acts or consent to the grant of an Act Provisional Order or licence under such Acts to any person or persons company or companies in respect of the area of supply mentioned in the Order or to the supply of electrical energy by any company corporation body or person within such area of supply and shall in every way assist the company at the cost of the company in opposing the grant of any such powers but no objection shall be taken to any other provisions of this indenture for want of mutuality on the ground that this covenant exceeds the powers of the Council."

The supply company duly erected a generating station and laid down mains in Birkdale, and commenced to supply electrical energy to the public lamps and to private consumers in that district. The Council afterwards leased all their tramway undertakings to the Southport Tramways Company, Ld., which also worked the tramways in the adjoining borough of Southport; and all the tramways were worked

H. L. (E.) 1924

SOUTHPORT CORPORATION v. ATTORNEY-GENERAL.

Viscount Cave.

as one system, the electric power for working the tramways in Birkdale being provided by the supply company.

By the Southport Extension Order, 1911 (which was duly confirmed by Parliament), the borough of Southport was extended so as to include the urban district of Birkdale, and the Corporation was substituted for all purposes for the Urban District Council. This Order contained the following clauses, which are material: "Art. XI. (3.) (*c*) The provisions of the Electric Lighting Orders Confirmation (No. 2) Act 1891 so far as that Act relates to the Southport Electric Lighting Order 1891 shall not extend and apply to that part of the borough which comprises the area of supply under the Birkdale Electric Lighting Order 1898 (confirmed by the Electric Lighting Orders Confirmation (No. 8) Act 1898) until such date as the Corporation become the undertakers under the last-mentioned Order and until that date all powers rights and duties of the Urban Council existing at the commencement of this Order under the said Birkdale Electric Lighting Order 1898 or under any agreement made in connection therewith shall vest in and attach to the Corporation of the borough and a reference to the Corporation of the borough shall be substituted for any reference therein to the Urban Council Upon the date on which the Corporation become the Undertakers under the said Birkdale Electric Lighting Order 1898 that Order shall be repealed. Art. XV. (2.) Anything duly done or suffered and all contracts deeds bonds agreements and other instruments (subsisting at the commencement of this Order) entered into or made by the Urban Council or their predecessors in relation exclusively to any part of the added areas shall be of as full force and effect against or in favour of the Corporation of the borough and may be continued and enforced as fully and effectually as if instead of the Urban Council or their predecessors the Corporation had done or suffered the same or been a party thereto."

After the incorporation of Birkdale in the borough of Southport, the Corporation of Southport continued for some time to allow electric power for the tramways in Birkdale to be provided by the supply company; but, ultimately, on

November 10, 1921, the Corporation, having taken a surrender from the Southport Tramways Company, Ld., of their lease of the tramway undertaking, ceased to take electrical energy from the company for tramway purposes and commenced to supply energy for this purpose from their own generating station in Southport. Thereupon the supply company and the Attorney-General on the relation of the company commenced this action against the Corporation, claiming a declaration in the above terms and an injunction and damages. The action was founded partly on cl. 8 of the second indenture of December 30, 1901, and the Southport Extension Order, and partly on the twenty-third section of the Electric Lighting Act, 1909.

The action was heard by Eve J., who gave judgment for the defendants, the Southport Corporation. The learned judge appears from his judgment to have inclined to the view that a corporation generating and providing electrical energy for the working of tramways owned by the corporation was "supplying" energy within the meaning of the Electric Lighting Act, 1882, and cl. 8 of the second indenture of December 31, 1901; but he considered himself bound by the decision of North J. in *West Surrey Water Co.* v. *Guardians of Chertsey Union* (1) to hold that the word "supply" must be construed in the more restricted sense of "the transfer of electricity from one who gives to the other who takes," and accordingly as not including the provision of electrical energy by the Corporation for its own tramways.

On appeal to the Court of Appeal, that Court reversed the decision of Eve J. As to the effect of cl. 8 of the agreement of December, 1901, the Court gave no decision; but they held that the word "supply" in s. 23 of the Electric Lighting Act, 1909, must receive the same meaning as in the Act of 1882, and that so construed it includes the provision by a corporation of electricity for lighting its own lamps or working its own tramways. The Court accordingly made a declaration in the above-mentioned terms, and granted an inquiry as to damages. Hence the present appeal.

(1) [1894] 3 Ch. 513.

H. L. (E.) 1924

SOUTHPORT CORPORATION v. ATTORNEY-GENERAL.

Viscount Cave.

My Lords, I propose first to deal with the claim founded on the indentures of December, 1901, and the Southport Extension Order of 1911.

In the first place I am of opinion that after the execution of the indentures of December, 1901, the Birkdale Urban District Council could not themselves have provided electrical energy for the purposes of the public lamps and tramways in Birkdale without committing a breach of their obligations under cl. 8 of the second indenture of that date. In construing that clause it must be borne in mind that the Council had by the first indenture assigned to the supply company for value the whole of their electrical undertaking, which included the right to provide electricity for the purposes of public lighting and for the tramways in Birkdale; and also that by cl. 3 of the second indenture the company had undertaken to generate within the district all electrical energy required for public or private lighting and for working any electric tramways in the district. The words "owned by them" in cl. 3 are admitted to have been inserted by mistake, and may be disregarded. In these circumstances it was natural that the company should require to be protected so far as possible against competition in the exercise of its powers, and cl. 8 was evidently inserted for that purpose. By that clause the Council agreed among other things (*a*) not to apply for any Act, Provisional Order or licence under the Electric Lighting Acts and (*b*) not to consent to the supply of electrical energy by any company, corporation, body or person within the Birkdale district. It is true that this agreement, if construed literally, might not prevent the Council from generating electricity themselves and using it for the purposes of their own lamps and tramways; but I do not think that such a construction would give the clause its fair and reasonable effect. The parties cannot have intended that the Council, while prevented by their contract from applying for statutory powers enabling them to provide electrical energy for the above purposes, should be free to provide it without such powers; or that, while under an obligation not to consent to the supply of such energy by any other corporation,

company or person, they should be at full liberty to provide it themselves. It appears to me, therefore, that in order to give a reasonable meaning to the clause it must be read as preventing the Council from themselves supplying electricity in derogation of their grant. Nor do I feel any doubt that the word "supply" in the same clause is to be construed in the sense which it bears in the Act of 1882 and the Order of 1898; that is to say, as including the provision of electrical energy for the public lamps and tramways though vested in the Council. If so, then at the date of the extension in 1911 the Council were under an obligation not to provide electricity for their lamps and tramways in competition with the supply company; and there can be no doubt that this obligation was transferred by art. XI. (3.) (*c*) and art. XV. (2.) of the Extension Order to the Corporation of the extended borough of Southport.

But, secondly, the same result may be reached by another road. Before the date of the extension the Corporation of Southport could not have supplied electrical energy to the public lamps and tramways in Birkdale without the consent of the Urban District Council; and by cl. 8 of the second indenture the Council had agreed not to give that consent. By art. XI. (3.) (*c*) of the Extension Order it was declared that the provisions of the Southport Electric Lighting Order should not apply to Birkdale until the Corporation of Southport took over the Birkdale Electric Lighting Order, and that until that date all existing powers, rights and duties of the Urban Council under the Birkdale Electric Lighting Order "or under any agreement made in connection therewith" (words which clearly include the agreements of December, 1901) should vest in or attach to the Corporation of the Borough; and art. XV. (2.) contained a comprehensive provision to the like effect. It appears to me that the duties and obligations which by those articles were thrown upon the Corporation of the extended borough included the obligation of the Council under cl. 8 of the deed of 1901 not to consent to the transfer of electricity generated in the old borough of Southport for use in the Birkdale area, and that this obligation continued in force notwithstanding that the Corporation had become

H. L. (E.) 1924

SOUTHPORT CORPORATION v. ATTORNEY-GENERAL.

Viscount Cave.

the governing body for Birkdale as well as for the old borough. No doubt there is some awkwardness in regarding the Corporation as "consenting" to the supply by its own officers of electricity to the added area, but in substance there is no difficulty. The effect of art. XI. (3.) (*c*) was to prolong for the purposes of electric supply the separation of Birkdale, in which the supply company continued to be the undertaker, from the old borough of Southport in which the Corporation was the undertaker for electric lighting purposes; and the Corporation in bringing into the former area of supply electrical energy generated in the latter is in fact permitting the invasion by an outside body of the company's area of supply. I think that on this ground also the Corporation in providing electrical energy for the Birkdale tramways is acting in breach of the contract and Extension Order and is liable to be restrained.

In view of the above observations, which are sufficient to dispose of this appeal, it is unnecessary to deal at length with the arguments addressed to your Lordships as to the effect of s. 23 of the Electric Lighting Act, 1909; and I think it sufficient to add that in my opinion the order of the Court of Appeal, so far as it was founded on that section, was fully justified. The word "supply" in s. 23 of the Act of 1909 must be read in the sense which it bears in the Act of 1882, with which the Act of 1909 is to be read; and it appears to me that in the Act of 1882 the word "supply" includes, not only the distribution of energy among ordinary consumers, but also the provision of electric light and power for the public lamps and tramways in the area of supply. It was argued on behalf of the appellants that having regard to the first proviso to s. 23 the operation of that section is confined to persons or companies whose primary business it is to supply electrical energy to consumers; but in my opinion that contention is not supported by the language of the section. Counsel for the appellants also endeavoured by reference to certain provisions in the Southport Extension Tramways Act, 1900, to bring the Corporation within the excepting

words in s. 23, "unless such supply or distribution is authorised by Act of Parliament, or by licence or Provisional Order granted in terms of the Electric Lighting Acts"; but I am satisfied, for the reasons given by the Master of the Rolls and Warrington L.J., that those provisions did not authorize the Corporation to supply electricity in the Birkdale district without the consent of the supply company and accordingly that the exception does not apply.

On the above grounds I am of opinion that the order of the Court of Appeal is right, and accordingly that this appeal fails and should be dismissed with costs.

My Lords, my noble and learned friend, Lord Shaw, has authorized me to say that he concurs in this judgment.

LORD DUNEDIN. My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Atkinson which he is about to read, and I concur in it.

LORD ATKINSON. My Lords, the suit out of which this appeal has arisen was instituted by the respondents for a declaration that the defendant Corporation, the Mayor, Aldermen and Burgesses of the county borough of Southport, were not entitled to generate for supply or distribution or to supply or distribute within the area which was formerly the urban district of Birkdale, electrical energy for any public or private purpose whatsoever, including the lighting of lamps in the streets and the town hall buildings, and the working of any electric tramways in such area, or to expend any part of the borough fund, or proceeds of the borough rate or other of their moneys for such purposes. And also for an injunction restraining the defendant Corporation from doing any of these things and an injunction to restrain them from themselves generating, or obtaining from any company, local authority or person other than the plaintiff company electrical energy for the lighting of public lamps in the streets and the town hall buildings, and the working of any electric tramways in the aforesaid area.

It is not disputed that the tramways in what was formerly

H. L. (E.) 1924

SOUTHPORT CORPORATION v. ATTORNEY-GENERAL.

Lord Atkinson.

Birkdale district are in a continuous line with those in the borough of Southport, as it was before its extension, joining up at what was in those days the boundary between the borough and the urban district. At the date of the extension of the borough and up to November 10, 1921, the Corporation provided the current for driving the tramcars up to the borough boundary, and the relators provided the current for driving the cars beyond that point. At midnight on November 10, 1921, the apparatus by which the relators supplied the current to drive these cars from this boundary, over what was formerly their urban district, was removed, and thereafter the cars were propelled by current generated and provided by the Corporation.

The Corporation contend that they have power and authority to do this under and by virtue of the provisions contained in the forty-second, sixty-third and sixty-fourth sections of the Southport Extension Tramways Act, 1900, notwithstanding the provision of the Southport Electric Lighting Order, 1891. The respondents contend, on the other hand, that the Corporation are prohibited from doing what they have been doing, first by a statutory enactment—namely, the twenty-third section of the Electric Lighting Act of 1909, which runs thus: "Where in any area a local authority, company, or person is authorised to supply electricity under Act of Parliament or under licence or Provisional Order granted under the Electric Lighting Acts, it shall not, after the passing of this Act, be lawful for any other local authority, company, or person to commence to supply or distribute electricity within the same area unless such supply or distribution is authorised by Act of Parliament or by licence or Provisional Order granted in terms of the Electric Lighting Acts: Provided that this section shall not prevent any company or person from affording a supply of electrical energy to another company or person where the business of the company or person affording the supply is not primarily that of the supply of electrical energy to consumers: Provided also that this section shall not prevent any company who at the passing of this Act are empowered by their memorandum of association

to generate electrical energy from affording a supply to a railway company for purposes incidental to that company's undertaking other than the conveyance of public traffic." And secondly by the provisions of two indentures, both dated December 31, 1901, whereby the Birkdale Urban District Council, therein styled "the Council," transferred, with the consent and approval of the Board of Trade, their undertaking with all their powers, duties, liabilities and works to the Birkdale District Electric Supply Company, Limited, therein styled "the company"—the relators in the aforesaid suit.

This transfer purports to have been made under the authority conferred by the fifty-ninth section of a certain Provisional Order obtained from the Board of Trade by the Council by virtue of its being the local authority for the purposes of the supply of energy, as therein defined, within the Urban District of Birkdale. This Order was duly confirmed by the Electric Lighting Orders Confirmation (No. 8) Act, 1898, the Council thereby becoming, for the purposes of the Order, the Undertakers.

By the second of the last-mentioned indentures, it is provided that it shall be construed as supplemental to the first, and shall have the same force and effect as if the two formed one instrument.

By the second clause of the latter indenture it is provided that the company (thus becoming the undertakers within the meaning of the Provisional Order) shall within three calendar months after the date of the deed of transfer, i.e., December 31, 1901, and the indorsement thereon of the approval of the Board of Trade, commence the works necessary for installing electric light throughout the streets and parts of streets mentioned in the Second Schedule to the Order, i.e., the Provisional Order already mentioned.

By its third clause it is provided that the company shall generate within the urban district of Birkdale all electrical energy required for public and private lighting and for the working of any electric tramway in the same district. And its eighth clause, upon which the second of the two

H. L. (E.) 1924 SOUTHPORT CORPORATION v. ATTORNEY-GENERAL. Lord Atkinson.

points in controversy turns, runs as follows: [His Lordship read the clause, which is set out in the opinion of Viscount Cave].

The Provisional Order, under the fifty-ninth section of which this transfer to the company purports to have been authorized, by its second section provides that the Order is to be read and construed subject in all respects to the provisions of the Electrical Lighting Acts of 1882 and of 1888 and of any other Acts or parts of Acts incorporated therewith, and further provides that the Acts and parts of Acts so incorporated are in the Order collectively referred to as "the principal Act." It further provides that the several words, terms and expressions to which by the principal Act meanings are assigned shall have in this Order the same respective meanings. The expression "energy" used in this Order is defined to mean electrical energy, and is to be deemed to be an agency as defined by Electric Lighting Act of 1882.

By the sixth section of the Order it is provided that subject to its provisions and those of the principal Act the undertakers may supply energy within the area of supply for all public or private purposes as defined by the said Acts. The Electric Lighting Act of 1882 is not only one of the component units of the so-called principal Act mentioned in this section, but it is, as it were, the parent statute upon which the subsequent Acts and Orders dealing with electric lighting by local authorities are engrafted. The provision of the third section of this parent statute clearly shows what is to be taken as, I think, the ordinary and natural meaning of the expression "to supply" as used in the statutes and Provisional Orders dealing with the creation and distribution of electric current by local authorities. I think the expression as so used is simply equivalent to the expression "to provide" or "to furnish." Of course, in any given case the context, the circumstances in reference to which the expression is used, and the subject matter to which it is directed may require that it should receive a meaning different from its ordinary and natural meaning. The contention put forward by Mr. Upjohn on

behalf of the appellants on this point was, as I understood him, something like this. The word "supply" as used in the before-mentioned statutes and Provisional Orders connotes the idea of the giving of the thing supplied by one person or body and the receiving of it by another and different person or body, a giver and receiver thus being necessary in every operation amounting to supplying anything. Where the giver and receiver are the same persons or bodies, the operation does not amount to supplying at all, he contended, inasmuch as no person or body can give anything to himself or itself, or receive anything from himself or itself. I am not quite sure that a fallacy does not lie concealed in the use in this connection of the words "himself or itself." By their use, the several unconnected and dissociated industrial works or establishments which are owned by one man are sunk, as it were, in this personality. If a man or a local authority should happen to own several works or factories completely separated, dissimilar in character, in equipment and operation, producing wholly different products, such, for instance, as a coal mine, a glassworks and a tramway, all of which he provided with electrical energy, I think it might quite properly be said that he supplied within the meaning of the Act of 1882 each of his works with that energy. In doing this, the owner would only be doing a thing exactly similar in kind to that which the local authority is empowered to do under sub-s. 3 of s. 3 of this very statute of 1882. This section commences by enacting that the Board of Trade may from time to time license any local authority, as defined by the Act, or any company or person to supply electricity under the Act for any public or private purposes within any area, subject to the following provision in the third sub-section. Public purposes are defined to mean lighting any public street or any place belonging to or subject to the control of the local authority. The power, and the only power, conferred upon the local authority by this section is to supply electricity, and this it may do under this sub-section by providing for, or furnishing to, a thing owned or controlled by the local

[H. L. (E.) 1924

SOUTHPORT CORPORATION v. ATTORNEY-GENERAL.

Lord Atkinson.

authority itself the electricity it is empowered to supply. In such a case the local authority would, according to Mr. Upjohn's contention, be providing electricity for itself, and the operation would, notwithstanding the words of the sub-section, not amount to supplying it. The authority could not provide it at all unless it did amount to this. In the face of the provisions of this section Mr. Upjohn's contention is, in my opinion, entirely unsustainable.

Before dealing with the twenty-third section of the Electric Lighting Act of 1909, it would be well to consider the powers conferred, and the duties imposed, upon the Southport Corporation and the Birkdale District Council by the Southport Electric Lighting Order, 1891, and the Birkdale Electric Lighting Order, 1898, respectively.

The first Order begins with the usual provision that the Order is to be read and construed subject in all respects to the provisions of the Electric Lighting Acts, 1882 and 1888, and the Acts and parts of Acts incorporated therewith, which are to be referred to collectively as the principal Act, and then enacts that the words and terms used in the Order shall have the same meaning as that assigned to them in the latter Act. By the fourth section of this Order the Mayor, Aldermen and Burgesses of Southport are made the Undertakers for the purposes of the Order. By the fifth section the whole of the municipal borough is made the area of supply. By the sixth section the undertakers are empowered, subject to the provisions of the Order and of the principal Act, to supply energy (i.e., as defined, electrical energy) within the area of supply for public and private purposes as defined by the said Act (i.e., the principal Act). But the most important statutory unit composing this principal Act (i.e., the Act of 1882), by its third section shows that a supply for public purposes may mean a supply by the local authority to property it either owns or controls itself. The second of the above-mentioned Orders—the Birkdale Electric Lighting Order, 1898—contains in its second section provisions precisely similar to those contained in the second section of the Southport Order seven years earlier in date. By its fourth

section the Birkdale Urban District Council are made the undertakers for the purposes of the Order just as the Mayor, Aldermen and Burgesses of Southport were made the undertakers for the purposes of the Order of 1891. The area of supply is the urban district of Birkdale just as the borough of Southport was made the area of supply under the Southport Order, and by the sixth section of this Order of 1898, just as by the sixth section of the previous Order of 1891, the undertakers are empowered, subject to the provisions of the Order and of the same principal Act, to supply electrical energy within the area of supply for all public and private purposes as defined by the said Act—that is, the principal Act. The two Orders are practically identical in terms, the name of the local authority and the area of supply alone being changed. The two sets of undertakers are treated in the same way and are endowed with corresponding powers. It has not been shown that any one of the legal enactments collectively described as "the principal Act" contains a definition of public purposes other than or different from that given in the Electric Lighting Act of 1882. It was for the appellants to show that there was such a different definition if it existed. They have not done so. It appears to me, therefore, that the words "public purposes" used in these two Orders must have the same meaning as they have in the Act of 1882, a meaning which, as has already been pointed out, shows that the word "supply" may properly be used to describe the giving by a man or a body of a certain thing to an institution, work or industry which he or it either owns or controls. Upon the two systems thus established upon similar lines in the borough of Southport and urban district of Birkdale for the generation and supply of electrical energy, two systems of tramway traction were brought into touch and placed in connection. In the case of the borough of Southport by the Southport Extension Tramways Act of 1900, and in the case of the Birkdale urban district by the Birkdale District Tramway Order, 1901. Much reliance was apparently placed by the appellants upon the provisions of this statute of 1900.

H. L. (E.) 1924 SOUTHPORT CORPORATION v. ATTORNEY-GENERAL. Lord Atkinson.

Its thirty-seventh and thirty-ninth and forty-second sections run as follows :—

" 37. The power conferred on the Corporation by the Tramways Act 1870 to purchase tramways within the borough is hereby extended so as to authorise the Corporation by agreement to purchase or to take upon lease the Southport and Lytham Tramroad (South of the Ribble) the Ormskirk and Southport Light Railway and any authorised tramways tramroads or light railways outside and within seven miles of the boundary of the borough which form continuations of authorised tramways tramroads or light railways at any time existing within the borough which can be worked in connexion therewith Provided that nothing in this Part of this Act contained shall prejudice or affect the powers of the local authorities for the respective districts or parishes in which such tramways may be situate under section 43 of the Tramways Act 1870."

" 39.—(1.) The local authority for any district adjoining or near to or connected by tramway with the borough may grant to the Corporation and the Corporation may take a lease of any tramway in the district of such local authority for such period and upon such terms and conditions as may be mutually agreed upon and the provisions of section 19 of the Tramways Act 1870 (except so far as it prohibits or restricts the placing or running of carriages by a local authority upon such tramway) shall extend and apply to such lease."

" 42. Notwithstanding anything to the contrary contained in the Tramways Act 1870 or in any other Act or Order the Corporation may place and run carriages on and may work any tramways tramroads or light railways for the time being belonging to or in lease to the Corporation or on which they may have any powers to place or run carriages whether within or beyond the borough and may take and demand tolls and charges in respect of such tramways tramroads or light railways and of the use of carriages thereon and the Corporation may reconstruct or alter such tramways tramroads or light railways and may provide all such buildings cars rolling stock engines

machinery electric and other plant apparatus and appliances horses and stables as they may deem requisite or convenient for the working or user by the Corporation of the tramways tramroads or light railways by animal or mechanical power and may sell or dispose of or exchange such of the before-mentioned articles and things as from time to time may no longer be required."

It was contended before your Lordships on behalf of the appellants, as it was in the Court of Appeal, that as the Corporation were by this s. 42 empowered to work tramways beyond the borough, and to erect such electric and other plant as might be required or be convenient for this working it must be held by implication to mean that they were authorized to supply electric energy for working the tramway beyond the borough in any area into which the tramway penetrated, even although that area was an area of supply in which other undertakers were authorized to supply electric energy, and that too against the will and in defiance of the protest of these latter undertakers. This forty-second section is designed to help to carry out the operations set forth in the recitals mentioned in the Act. It does so and is in harmony with the thirty-seventh and thirty-ninth sections which precede it.

The section contains no express provision as to the supply of electrical energy. It confers a general power on the Corporation to work tramways beyond as well as within the borough by several means, of which electricity is one, but there is no necessary implication that this power can be exercised in direct conflict with the powers conferred on the local authority into whose area of supply the portion of the tramway lying beyond the borough penetrates. The preceding provisions of the statute are in favour of this conclusion, and it is fortified by the pregnant fact that in the Birkdale Urban District Tramway Order of the very next year, 1901, no allusion whatever is made to the alleged possibility of the tramways within their district being worked by the Corporation. Complete provision is made for the working by the Council of the tramways within their own area of supply, which is altogether inconsistent with the possibility of this invasion.

H. L. (E.) 1924

SOUTHPORT CORPORATION v. ATTORNEY-GENERAL.

Lord Atkinson.

By the second section of this Order the Tramways Act of 1870 is, where not expressly varied or inconsistent with the Order, incorporated with it. The carriages on the Tramway may with the consent of the Board of Trade be moved by electric power. (Sect. 19.)

By the twenty-third section it is provided that subject to the provisions of the Order and the consent of the Board of Trade, the promoters (i.e., the District Council) may from time to time enter into and carry into effect agreements with any company, body or person authorized to supply electric energy for tramway purposes for the supply by such company, body or person of such energy for the purposes of the tramways of the Council.

These provisions appear to me to be wholly inconsistent with the existence of the power the Corporation claim to have under the forty-second section of the Southport Extension Tramways Act of 1900.

The sixty-fourth section of this Act of 1900 runs as follows : "The Corporation on the one hand and any tramway or tramroad company or any company authorised under the Light Railways Act 1896 to construct a light railway and respectively having power to use electrical energy for traction purposes partly within and partly without the borough on the other hand may from time to time enter into and carry into effect an agreement for and in relation to the supply of electrical energy by the Corporation to such company for all or any purposes for which such company are empowered to use the same. Provided that the Corporation shall not supply electrical energy in any district without the borough except with the consent of any local authority company or person who shall be supplying electrical energy in such district under statutory authority."

Then follows a second proviso, which is irrelevant. The first proviso is in absolute conflict with the construction put upon the preceding forty-second section on behalf of the appellants, as indeed are the other legislative provisions already referred to.

I presume these several Acts and Orders which I have

gone through were dealt with at length by Mr. Upjohn with the view of showing that by them legal authority was conferred upon his clients to do what they have done. I have considered them most carefully, and, speaking for myself, I must say I cannot find that the appellants have had, either expressly or by implication, conferred upon them any legal right, power or authority whatsoever to take the course they have taken.

Turning now to the statute of 1909. The first sub-section of the fifth section contains provisions which have an important bearing upon this case. It runs as follows: "Any local authority, company, or person authorised to supply electricity in any area, may, with the consent of the Board of Trade, supply at any point within that area electricity for the purposes of haulage or traction on any railway, tramway, or canal situate partly within and partly without that area, and for the purposes of lighting vehicles and vessels used on any such railway, tramway, or canal; but the Board of Trade shall not in any case give any such consent until notice of the application has been given by advertisement or otherwise in such manner as the Board of Trade may direct, and an opportunity has been given to any person who appears to the Board to be affected of stating any objections he may have thereto."

Sub-s. 2 of the same section provides that the Board of Trade may, by Provisional Order, authorize any such local authority, company or person, to supply electricity to be used for purposes incidental to the working or lighting of such railway, tramway or canal, other than the purposes aforesaid. These provisions show clearly that the supply of electric energy by the person or bodies therein mentioned for the purposes mentioned is not a thing which can be done as of course; on the contrary, even though the portion of the railway, tramway or canal situate outside the area mentioned should not be situated within the area of supply of any other local body, the Board of Trade keeps control over the matter and the stringent conditions mentioned in the section have to be satisfied. Eve J. finds that on February 18, 1918, on the surrender by the tramway company to the Corporation of their lease, the latter body became the owners of the whole

H. L. (E.) 1924 SOUTHPORT CORPORATION v. ATTORNEY-GENERAL. Lord Atkinson.

length of the tramway, but the two existing systems for the generation and supply of electric energy thereto were not unified. They continued separate, and no attempt was made by the Corporation to proceed under this section.

The language of the portion of the twenty-third section terminating at the word "provided" where it first occurs is quite clear and unambiguous. The plain object of the section is to protect the interest of a local body, company, or person first authorized by Act of Parliament, licence or Provisional Order of the kind named to do the things mentioned from being injured by some other local authority, company, or person subsequently commencing to supply or distribute electricity in the area. I use this word "subsequently," because I think the word "commence" indicates that the first undertakers, as they may be styled, have been duly authorized to supply electricity before the second undertakers have commenced to supply or distribute it. The way in which this protection is given is by making this second supply or distribution of electricity unlawful, unless it be authorized by an Act of Parliament or licence granted in terms of the Electric Lighting Acts. It cannot be pretended that the Corporation was ever thus authorized to supply or distribute electricity within the area in which the Birkdale Council is authorized to supply it. If the action of the Corporation which is complained of can be justified at all, it can only be justified by the Southport Electric Lighting Order, dated 1891. They apparently rely upon that Order and they must rely upon it, as they have no innate power of supplying or distributing electricity in any area, but this Order fails them.

As I understood Mr. Upjohn's contention in reference to this section, it amounted to this. The first proviso furnishes, he urged, a kind of key to the proper construction of the preceding part of the section, and with the aid of that key it cannot or should not be held that the word "supply" has its ordinary and natural meaning in the first part of the section, else the section might be held to include what was styled "a domestic provision," such as the lighting of a house belonging to a private individual situated in his own yard, or of a public

building by a corporation by means of an installation for that purpose alone in a building in its own grounds. It may possibly be that such cases as these would amount to a supplying and that a Provisional Order would not be necessary to authorize them. It is not necessary in this case to decide that point, but these things are wholly different from what the Corporation have been doing in this case. They are treating it as part of their business to supply energy under the powers of this Order of 1891, which by its sixth section authorizes them to supply energy for public purposes (which may include their own purposes) as defined by the principal Act. There is no reason, therefore, why the word "supply," as used in this twenty-third section, should not have the same meaning as it bears in the Electric Lighting Act of 1882, with which, according to the twenty-seventh section of the Act of 1909, it is to be construed.

I concur in the opinions expressed both by Lord Sterndale and Warrington L.J. that the proviso so much relied upon does not affect the case, and that the appellants have been and are acting in violation of the twenty-third section of the Act of 1909, and that the appeal should be dismissed on this ground. It is unnecessary, under these circumstances, as it was in the Court of Appeal, to decide the point raised in s. 8 of the second indenture of December 31, 1901.

LORD SUMNER. My Lords, what the Southport Corporation are doing and what the Birkdale District Electric Supply Company want to have them restrained from doing, is generating electric energy and supplying it to their own tramways for the purpose of running their own tramcars. I do not understand it to be argued that it is ultra vires for them to do this. They certainly are empowered to generate electricity, and are also empowered to own and work tramways, and, if they combine the two powers and run their own cars with their own home-made current, it is not a matter of restraining them from spending the ratepayers' money on things that it is beyond their power to do, but of restraining them from doing something, which in itself they are authorized

H. L. (E.) 1924

SOUTHPORT CORPORATION v. ATTORNEY-GENERAL.

Lord Sumner.

to do, at the instance of an outside party—the Birkdale Company to wit—because, by contract or by statute, the exercise of the Southport Corporation's powers is limited and clogged for the benefit of the Birkdale Company. Accordingly the first thing to be done is to decide the meaning of s. 23 of the Electric Lighting Act, 1909.

I remark three things: (1.) It is a General Act. Hence, there is no ground for expecting that it should cover among others the present special case; (2.) the clause is a monopoly clause; hence, if anything, its words should be read more strictly than might be the case with other clauses; (3.) there does not seem to be more hardship involved in one construction than in another. If it is hard that the company should suddenly lose their largest customer, it is also hard that the ratepayers of the borough should have to pay a price, which will yield a profit to the company for a supply of current which they can generate for themselves at cost price.

The word "supply" is used seven times in this clause, twice as an active verb and five times as a noun-substantive. As the declaration made by the Court of Appeal is that Southport is not authorized or entitled "to supply or distribute" electricity in Birkdale, it is on the first five lines of the clause and on the second mention of the verb "to supply" that the matter really turns. I agree that the purposes of the supply are subject to the definition of public and private purposes in the Act of 1882, but the purpose of the supply does not become material till it has been decided whether or not Southport is entitled "to supply" at all. If the words of definition about public and private purposes had been written into s. 23 after the verb "to supply" it does not appear to me that it would affect the construction.

The limits, within which the company can claim to have the borough's activities restricted, are defined by the words "where in any area a . . . . company is authorised to supply electricity by Act of Parliament or under licence or Provisional Order, etc.," and I think the words "to supply"

in the prohibition must have the same meaning as those words bear in the definition of the area of prohibition. The thing, which the Corporation are not to do, must be commensurate with the thing, which the company are authorized to do. To carry the prohibition further is neither good construction nor even-handed justice. Now the company are authorized to supply for the purposes of their business —that is, to supply customers with electricity for reward. I think no wider or other content is reasonable when we come to the words of prohibition, "it shall not be lawful . . . to supply."

"To supply" as an active verb implies to supply something to somebody, and, unless the verb is expressly made reflexive by adding "themselves," the natural meaning is to supply to somebody not themselves. Though the actual sentence under construction in *West Surrey Water Co.* v. *Guardians of Chertsey Union* (1) is different, I think the construction which North J. there put on the word "supply" was sound. Whatever may have been intended by adding the words "or to distribute," in the present section, exactly the same observation applies. It must be a distribution to somebody, and that must be to somebody not themselves till the contrary is stated. Probably "supply" here implies a wholesale and "distribute" a retail dealing, or possibly supply takes place at one point and distribution at many. The use of these words is a matter of the technique of the electrical industry, as to which I think we ought to have had evidence, had it been material to distinguish these two terms of art. In my opinion, it is not.

My Lords, if this construction be sound, as I think it is, the purposes of the supply do not matter. As the borough supplies electricity to itself and not to strangers, it is not doing that which the section declares to be unlawful. The section is aimed at restricting competition in trade, not at binding the borough to buy the company's product. If the borough abandoned the use of electricity for its tramways and used some other prime mover, it would not be s. 23

(1) [1894] 3 Ch. 513.

H. L. (E.) 1924

SOUTHPORT CORPORATION v. ATTORNEY-GENERAL.

Lord Sumner

at any rate that could be resorted to in order to prevent them.

There remains s. 8 of the agreement of December 31, 1902. As to this I will assume that the agreement now binds the Corporation of Southport, as if they had been the original contracting parties. The clause as a matter of construction means that there are three things which the Corporation will not do—namely, (1.) apply for legal powers; (2.) consent to the grant of legal powers to any other undertaker; (3.) consent to the supply of electrical energy by any other undertakers. How does this assist the respondents? "Consent to the supply" can only mean that one party—the Corporation—consents to something which another party does. A person does not consent to what he does himself; he does it. I think it pretty plain that what the agreement, speaking over twenty years ago, really refers to by these words is such supply as could be made commercially practicable without obtaining Parliamentary powers, when for example ownership, leasing, wayleaves, and the consent of the road authority could be combined, so that the supply could be successfully brought to the customer's premises.

My Lords, I know it is said that at the date when the Birkdale authority contracted in these words, it had no power to consent to the Southport Corporation's sending this supply of electricity into Birkdale, so as to compete with the company, and it is asked, when the Southport Corporation step into the shoes of the Birkdale authority, administratively and contractually, how does that alter the meaning of s. 8?

The answer is that of course it does not, but it is fallacious to suppose that, in the event suggested, the change in the rights is due to any change in the construction of the agreement. It is due to the change in the facts. Before the transfer of the agreement, the supposition is that Southport supplies, and Birkdale consents thereto, and that is what the agreement forbids. After the transfer the facts are altered. Now Southport supplies itself in Birkdale

as in Southport, and no consent to that is needed or is given.

It may be thought that such a construction savours of Shylock. That does not prevent it from being a right construction, nor can such a stricture entitle any one to read plain English in a non-natural sense. The truth is that on one or other of the occasions when the company made agreements with the Corporation they should have faced the possibility of what has occurred and have covered the contingency of Southport's resorting to a domestic supply by express and apt words. If they had preferred to rely on a clause in an old agreement, not aimed at such a thing at all, or on a section in a general statute framed with a different object, they must now take the consequences.

With the greatest respect to others, whose opinions I am unable to adopt, I think the appeal succeeds.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 30, 1924.

Solicitors for the appellants: *Sharpe, Pritchard & Co., for J. Ernest Jarratt, Town Clerk, Southport.*

Solicitor for the respondents: *Sydney Morse.*

[HOUSE OF LORDS.]

H. L. (E.)*
1924
July 22.

PORT OF LONDON AUTHORITY . . APPELLANTS;

AND

MAYOR, ETC., OF METROPOLITAN BOROUGH OF WOOLWICH . . } RESPONDENTS.

Rates—Metropolis—Woolwich—General District Rate—Land covered with Water—Partial Exemption granted by Public Health Act, 1875*—Continuation of Exemption—Dock coming into existence after 1901—London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 10, *sub-s.* 1; *s.* 19, *sub-s.* 1*—London (Rating) Scheme*, 1901, *clauses* 2, 6.

Before the coming into operation of the London Government Act, 1899, a general district rate was levied under the Public Health Act, 1875, in the parish of Woolwich, and under the said Act docks situated in the said parish, so far as they consisted of land covered with water, were assessable to the general district rate upon one-fourth part only of the net annual value thereof. By the London Government Act, 1899, and the schemes made thereunder the expenses of the metropolitan borough councils were defrayed out of a general rate, and Woolwich was placed under the general law applying to metropolitan boroughs, and the rating sections of the Public Health Act, 1875, so far as they applied to Woolwich, were repealed as from April 1, 1901, the date of the coming into operation of the London Government Act, 1899, for rating purposes; but by cl. 2 of the London (Rating) Scheme, 1901, effect was to be given "to any exemption from any existing rate," and by cl. 6 "existing rate" was defined as meaning any rate leviable in a metropolitan borough before April 1, 1901:—

Held (by Viscount Cave, Viscount Finlay, Lord Atkinson, and Lord Sumner, Lord Wrenbury dissenting), that the partial exemption under the Public Health Act, 1875, in respect of land covered with water in the parish of Woolwich did not apply to a dock coming into existence after the commencement of the London Government Act, 1899.

Dictum of Channell J. in *London and India Docks Co.* v. *Borough of Woolwich* [1902] 1 K. B. 750, 759 approved.

Decision of the Court of Appeal [1924] 1 K. B. 30 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of a Divisional Court upon a special case stated by the Court of quarter sessions for the county of London.

The appellants, the Port of London Authority, were the owners and occupiers of a dock known as King George V. Dock, part of which was situated in the metropolitan borough

* *Present:* VISCOUNT CAVE, VISCOUNT FINLAY, LORD ATKINSON, LORD SUMNER, and LORD WRENBURY.

(1) [1924] 1 K. B. 30.

of Woolwich. The construction of the dock was commenced in 1912.

Before the coming into operation of the London Government Act, 1899, and the schemes made thereunder, a general district rate was levied under the Public Health Act, 1875, in the parish of Woolwich, which now formed part of the metropolitan borough of Woolwich, and land covered with water was under the said Act assessable to the general district rate in the proportion of one-fourth part only of the net annual value thereof.

In a general rate made by the respondents in 1922 under the London Government Act, 1899, the appellants were rated in respect of that part of the dock which was situated in the metropolitan borough of Woolwich upon the full net annual value thereof. The appellants appealed against the rate, and claimed that the hereditament in question was entitled to the partial exemption granted by the Public Health Act, 1875.

The substantial question raised by the appeal was whether, upon the construction of the London Government Act, 1899, and the schemes made thereunder, the partial exemption of land covered with water from the general district rate formerly levied in the parish of Woolwich applied to all hereditaments of the exempted class irrespective of the date at which they came into existence, or whether it was limited to hereditaments in existence at the date of the coming into operation of the Act.

The facts are fully stated in the report of the case before the Court of Appeal.

The Divisional Court (Lord Hewart C.J., Shearman and Branson JJ.) adopted the former of the two alternatives and held that the exemption applied to the hereditament in question, so far as it consisted of land covered with water. The Court of Appeal (Lord Sterndale M.R., Warrington and Scrutton L.JJ.) reversed this decision and upheld the rate.

1924. May 26, 27. *Sir John Simon K.C.* (with him *E. H. Tindal Atkinson*) for the appellants. The partial

H. L. (E.) 1924 — PORT OF LONDON AUTHORITY v. WOOLWICH CORPORATION.

exemption granted by s. 211 of the Public Health Act, 1875, in respect of land covered with water is continued both by s. 10, sub-s. 1, of the London Government Act, 1899, and by clauses 1 and 2 of the London (Rating) Scheme, 1901. That scheme was preceded by the London (Woolwich) Scheme, 1900, which was to have effect subject to the provisions of any future scheme protecting the interests of the owners and occupiers of any hereditaments which were wholly or partially exempt from any rate. The object of the Legislature was to preserve for the future any exemption for a generic class of property. Before the passing of the London Government Act, 1899, the occupier of docks in Woolwich was entitled to a partial exemption in respect of the general district rate, but not in respect of the poor rate, and after the assessment of the two rates as one rate special provisions were required to distinguish the elements of the rate. These special provisions are to be found in cl. 2 of the London (Rating) Scheme, 1901. The definition of "existing rate" in cl. 6 of the scheme refers to any existing kind of rate, i.e., to the general district rate on the one hand and the poor rate on the other. The privilege preserved by the scheme is not an exemption enjoyed by a specified list of individual hereditaments, but is a generic exemption enjoyed by a certain class of hereditaments, whenever they come into being.

Macmorran K.C. and *Sydney Turner* for the respondents. The object of the London Government Act, 1899, and of the London (Woolwich) Scheme, 1900, was to bring Woolwich within the metropolis for all purposes and to take it out of the jurisdiction of the Public Health Act, 1875, and the exemption granted by s. 211 of the latter Act in respect of land covered with water was not preserved by the London Government Act or by any scheme made thereunder. The exemptions which are preserved are such exemptions only as were, prior to the commencement of the London Government Act, in operation throughout the metropolis as a whole. This contention is inconsistent with *London and India Docks Co.* v. *Borough of Woolwich* (1), which it is submitted was wrongly

(1) [1902] 1 K. B. 750.

decided. Assuming that the exemptions preserved by the Act of 1899 and the schemes made thereunder included the partial exemption formerly operative in the parish of Woolwich, that exemption is limited to the owners and occupiers of hereditaments in existence at the time when the change in the rating took place. The intention of the Legislature was not to confer an exemption, but to continue an exemption. This view of the Act is supported by Channell J. in *London and India Docks Co.* v. *Borough of Woolwich.* (1) Clause 2 of the London (Rating) Scheme, 1901, is mere machinery to give effect to exemptions already in existence, and shows how those exemptions are to be preserved; it has no special application to Woolwich, and it is not inconsistent with the construction contended for by the respondents.

Sir John Simon K.C. replied.

The House took time for consideration.

1924. July 22. VISCOUNT CAVE. My Lords, the question to be determined on this appeal is whether so much of the King George V. Dock of the appellants as is situate in the parish of Woolwich is liable to be assessed to the general rate made by the respondents under the London Government Act, 1899, at its full annual value, or whether the appellants are entitled in respect of that hereditament to a partial exemption from the rate. The solution of this question depends on the construction to be put upon certain sections of the Act, and upon a scheme made under it.

Before the passing of the London Government Act, 1899, the greater part of the administrative county of London (excluding the City of London) was governed for local purposes by vestries or district boards established under the Metropolis Management Act, 1855; and the expenses incurred by those authorities were defrayed by means of three separate rates which were levied with the poor rate—namely, the sewers rate, the lighting rate and the general

(1) [1902] 1 K. B. 750, 759.

H. L. (E.) 1924 PORT OF LONDON AUTHORITY v. WOOLWICH CORPORATION. Viscount Cave.

rate (Metropolis Management Act, 1855, s. 161). The same Act conferred or retained certain total or partial exemptions from the sewers rate (ss. 163 and 164) and from the lighting rate (s. 165), and also a more general exemption from rating which was applicable to the Inns of Court and certain other properties (s. 176).

The position of the parish of Woolwich was different from that of the other metropolitan parishes. Woolwich, although included in the administrative county of London (Local Government Act, 1888, ss. 40, 100), was not affected by the provisions of the Metropolis Management Act, 1855, except so far as they referred to main drainage: see s. 238 of that Act. It was under the jurisdiction of a local board established in accordance with the Public Health Act, 1848, by virtue of a provisional order confirmed by the Public Health Supplemental Act, 1852. The Public Health Act, 1875, at its passing, did not apply to Woolwich; but by s. 102 of the Public Health (London) Act, 1891, many of the provisions of the Act of 1875, including the rating sections of that Act (ss. 207, 209 to 227), were made applicable to Woolwich. Under these rating sections the expenses of the Woolwich Local Board were defrayed by means of a rate called the general district rate, which was assessed on the full net annual value of all property assessable to the poor rate; but by s. 211 certain kinds of property, including "land covered with water," were to be assessed to the general district rate on one quarter only of their net annual value. It is the question of the survival of this last-mentioned exemption which is at issue in these proceedings.

By the London Government Act, 1899, s. 1, it was enacted that the whole of the administrative county of London, exclusive of the City of London, should be divided into metropolitan boroughs in accordance with the first Schedule to the Act; and among the areas specified in that Schedule as constituting the new metropolitan boroughs was the parliamentary borough of Woolwich, which included not only the parish of Woolwich but also the adjoining parishes of Plumstead and Eltham, which had long been subject to

the Metropolis Management Acts. By s. 4 of the Act of 1899, it was provided that on the appointed day (which was afterwards fixed for rating purposes as April 1, 1901) every elective vestry and district board in the county of London should cease to exist and their powers should be transferred to the council for the borough comprising the area within which those powers were exercised. Under ss. 15 and 16 of the Act schemes for carrying the Act into effect were to be made by Commissioners and confirmed by Orders in Council. Sect. 35 repealed a number of enactments, including those sections of the Metropolis Management Act, 1855 (ss. 161 to 169 and 176), which authorized the levying of a sewers rate and a lighting rate and conferred or preserved exemptions from those rates. The Act also contained the following provisions, which it is desirable for the purpose of this judgment to set forth in full :—

" Sect. 10, sub-s. 1.—A scheme under this Act shall provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers rate and separate lighting rate, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments.

" Sect. 19, sub-s. 1.—A scheme under this Act shall provide for placing Woolwich under the general law applying to metropolitan boroughs, and for the repeal of the application thereto of the provisions of the Public Health Acts and other enactments not applying to London, and for the application thereto of the Metropolis Management Acts, 1855 to 1893, and other enactments applying to London."

In pursuance of the Act of 1899 a number of schemes were duly made and confirmed, but it is only necessary to mention two of such schemes. By the London (Woolwich) Scheme, 1900, effect was given to s. 19 of the Act of 1899 by repealing the Public Health Acts so far as they applied to Woolwich, and providing that the Metropolis Management Acts and the other Acts applying to London should apply

H. L. (E.) 1924

PORT OF LONDON AUTHORITY v. WOOLWICH CORPORATION.

Viscount Cave.

to that parish; but it was provided that ss. 207 and 209 to 227 of the Public Health Act, 1875, should continue to apply to Woolwich until March 31, 1901. This scheme contained the following saving clause :—

" Clause 1 (2.).—This scheme shall have effect subject to the provisions of any future scheme made under the Act, and in particular to the provisions of any such scheme making provision for the protecting the interests of owners and occupiers of any hereditaments which are exempt from any rate, or liable to be assessed thereto at a less amount than other hereditaments."

By the London (Rating) Scheme, 1901, which applied not to Woolwich only but to the whole of the metropolis, effect was given to s. 10, sub-s. 1, of the Act of 1899. The material parts of this scheme were as follows :—

" 1.—(1.) Subject to the provisions of this scheme, as from the first day of April, one thousand nine hundred and one, all money to be raised by rates to meet the expenses of the council of every metropolitan borough, including the sums of money required to be levied by any precept served on the borough council, shall be paid out of the general rate, and a separate sewers rate and a separate lighting rate shall not be levied.

" 2.—(1.) In levying the general rate after the first day of April, one thousand nine hundred and one, effect shall be given to any exemption from any existing rate (whether that exemption is given by way of reduced assessment or by levying a differential rate in the pound or in any other manner) by means of the deduction from the total amount of the general rate which would otherwise be payable in respect of any hereditament to which the exemption applies of a proportionate part (corresponding to the exemption) of the amount produced by the rate in the pound which is treated as levied for the purposes in respect of which the exemption exists, or, in the case of a total exemption, equal to the whole amount so produced. . . . .

" (2.) Where in any metropolitan borough the owners or occupiers of any hereditaments or any class of hereditaments

are entitled to any exemption, the council of that borough shall apportion the total rate in the pound amongst the various purposes for which the general rate is levied, so as to show approximately the rate in the pound required for any purpose or any number of purposes in respect of which there is such an exemption, and shall enter the rates in the pound so apportioned in the heading of the rate, and the rates in the pound so apportioned and entered shall be treated as levied for the purposes in respect of which the exemption exists. . . . .

" (4.) Nothing in this scheme shall be construed as extending the duration of an exemption beyond the period during which it would have continued had the Act not been passed. . . . .

"'6. For the purposes of this scheme the expression 'existing rate' means any rate leviable in a metropolitan borough before the first day of April, one thousand nine hundred and one."

In the year 1912 and subsequent years the appellants under their statutory powers constructed a dock known as the King George V. Dock, parts of the dock being in the parish of Woolwich; and they are the owners and occupiers of the dock. On April 3, 1922, the respondents, acting under the powers conferred by the London Government Act, 1899, made a general rate in which they rated the appellants in respect of the hereditament consisting of that part of the King George V. Dock which is in the parish of Woolwich at its full net annual value. The appellants appealed against this rate to the London quarter sessions, and contended that, having regard to the Act of 1899 and the schemes made under it, the partial exemption in s. 211 of the Public Health Act, 1875, of "land covered with water" applied to all hereditaments of that description irrespective of the date on which they came into existence, and accordingly that they were entitled in respect of the rated hereditament to be exempted to the extent of three-fourths from so much of the general rate as was made for the purposes for which a general district rate was made before the Act of 1899 came into

H. L. (E.) 1924

PORT OF LONDON AUTHORITY v. WOOLWICH CORPORATION.

Viscount Cave.

operation. The quarter sessions found that on this footing the amount to be deducted was 459*l.* 7*s.* 6*d.*; but they decided the point of law against the appellants and dismissed the appeal, subject to a special case which was stated for the opinion of the High Court.

The arguments on the special case were heard by a Divisional Court of the King's Bench Division of the High Court, consisting of the Lord Chief Justice and Shearman and Branson JJ.; and that Court was unanimously of opinion that the effect of s. 10, sub-s. 1, of the Act of 1899 and of the London (Rating) Scheme, 1901, was to preserve the partial exemption conferred by s. 211 of the Public Health Act, 1875, not only as to hereditaments which were in existence and entitled to exemption when the Act of 1899 came into operation, but also as to all hereditaments which might afterwards come within the exempted classes, and accordingly that the deduction claimed by the appellants should be allowed. On appeal to the Court of Appeal, that Court (consisting of the late Master of the Rolls, Lord Sterndale, and Warrington and Scrutton L.JJ.) unanimously reversed the decision of the Divisional Court and, holding that the exemption in question was preserved only as to hereditaments which were entitled to it when the Act came into operation, restored the order of quarter sessions. Hence the present appeal.

My Lords, it will be obvious from the above statement of the Acts and other instruments which have led up to this litigation, as well as from the difference of judicial opinion which has emerged, that the question to be determined on this appeal is one of considerable difficulty; but, after fully considering the arguments adduced on both sides, I have come to the conclusion that the order of the Court of Appeal was right.

It was urged on behalf of the respondents that s. 10, sub-s. 1, of the Act, so far as it refers to exemptions, refers only to exemptions applicable to the greater part of the metropolis under the Metropolis Management Acts, and not to the exemptions from the general district rate contained in s. 211

of the Public Health Act, 1875. I am unable to accept that view. The contrary was decided, and (I think) rightly decided, in *London and India Docks Co.* v. *Borough of Woolwich* (1), where it was held by a Divisional Court consisting of Lord Alverstone C.J. and Darling and Channell JJ., that the partial exemption conferred by s. 211 of the Act of 1875 on "land covered with water" was preserved by s. 10 of the Act of 1899 as to a dock in Woolwich which was in existence at the date when the latter Act came into operation. Indeed, if it were otherwise, great injustice would be done to the owners and occupiers of property in Woolwich who were entitled, at the passing of the Act, to the benefit of the partial exemption contained in s. 211 of the Act of 1875; for they would be wholly unprotected, while the persons interested in hereditaments situated in other parts of the metropolis and entitled to similar exemption under ss. 163 to 165 of the Metropolis Management Act, 1855, would be safeguarded. But while I am satisfied that s. 10, sub-s. 1, refers to the exemptions under s. 211 of the Public Health Act, 1875, as well as to the exemptions under the Metropolis Management Act, 1855, I think that it is evident from the frame of the Act of 1899 that s. 10, sub-s. 1, is intended for the protection of existing interests only. The effect of ss. 19 and 35 is to bring about the total repeal of the provisions for exemption contained in s. 211 of the Public Health Act and in ss. 163 to 165 of the Metropolis Management Act; and it would be contrary to those two sections to hold that the same provisions were intended to be forthwith re-enacted by a scheme under s. 10 and to remain as a permanent part of the local rating law. It appears to me to be the more reasonable view that the Legislature intended to establish for the whole of the county of London a simple and uniform system of rating for defraying the expenses of local government, freed, as regards future hereditaments, from all special privileges, but at the same time to avoid injustice to existing owners and occupiers by means of a special scheme safeguarding their interests. This view is

(1) [1902] 1 K. B. 750.

H. L. (E.) 1924

PORT OF LONDON AUTHORITY v. WOOLWICH CORPORATION.

Viscount Cave.

supported by the language of s. 10, sub-s. 1; for the expression "protecting the interests" applies naturally to vested and not to expectant interests; and the use in the expression "any hereditament which is exempt" of the singular number and present tense also supports the more restricted construction of the section.

It follows from the above observations that in my opinion the privilege claimed by the appellants is not preserved by s. 10, sub-s. 1, of the Act of 1899; and I do not think that the London (Woolwich) Scheme, 1900, carries the matter any further. Clause 1 (2.) of that scheme only echoes the language of s. 10, sub-s. 1, of the Act, substituting "hereditaments which are exempt" for "hereditament which is exempt"; and proviso (*a*) to cl. 2 is consistent with either view of the question now under discussion.

There remains the London (Rating) Scheme, 1901, and it is upon the construction of cl. 2 (1.) of that scheme that the case really turns. It was pointed out on behalf of the appellants that, if it be the fact that this scheme goes beyond the authority given to the Privy Council by the Act of 1899, it is nevertheless valid and effective; for s. 16 of the Act applies to schemes to be made under it the provisions of s. 213 and para. 9 of the seventh Schedule of the Municipal Corporations Acts, 1882, and under those provisions a scheme when confirmed by Order in Council is to be deemed to be duly made. But although this may be so, it is nevertheless legitimate in construing a scheme to bear in mind the authority under which it is made; and if the scheme will bear two constructions of which one accords with and the other exceeds that authority, the Court would naturally lean somewhat towards the former. In the present case the scheme provides that in levying the general rate after April 1, 1901, "effect shall be given to any exemption from any existing rate"; and "existing rate" is defined by cl. 6 as meaning "any rate leviable in a metropolitan borough"—that is to say, in a place which under the Act becomes a metropolitan borough—"before the 1st day of April, 1901." Thus, in the case of Woolwich, effect is to be given to

any exemption from any rate leviable in that place before April 1, 1901—that is to say, to any exemption from the general district rate. But, as on that date the general district rate ceased to be leviable, no hereditament which afterwards comes into existence can possibly become entitled to any exemption from it; and accordingly the benefit of the provision must (I think) be limited to hereditaments which then existed. This view is supported by the reference in cl. 2 (1.) to the purpose in respect of which the exemption "exists," and also by sub-s. 4 of the same clause, which speaks of the period during which it would have "continued" had the Act not been passed; and I do not think that it is inconsistent with sub-s. 2 of cl. 2. Clause 7 was referred to in the argument; but its meaning is obscure, and I do not think that any sure inference can be drawn from it.

In the above cited case of *London and India Docks Co.* v. *Borough of Woolwich* (1) Channell J. expressed the opinion that, if a new dock were made in Woolwich, it would not be entitled to the benefit of the exemption in s. 211 of the Act of 1875. He said: "I understand the meaning and intention of s. 10, sub-s. 1, of the London Government Act, 1899, and of the scheme made under that Act, to be to prevent the particular persons in Woolwich, who were the owners or occupiers of hereditaments to which the exemption applied, from being rated any higher in the future. It is for that reason that I do not think that our present decision that the partial exemption of these appellants' premises continues is in any way contradictory to the express enactment, in s. 19, sub-s. 1, that Woolwich should be placed under the general law applying to metropolitan boroughs. I think that Woolwich is placed under the general law applicable to the metropolis with regard to the future, and that if any new dock is made it will come under that general law."

It is true that this was an obiter dictum, as the question of the position of future hereditaments did not arise in that case; and the point was kept open by Lord Alverstone. But the

(1) [1902] 1 K. B. 750, 759.

H. L. (E.) 1924

PORT OF LONDON AUTHORITY v. WOOLWICH CORPORATION.

point having now arisen, I find myself in agreement with the reasoning of Channell J.

For the above reasons I am of opinion that the decision of the Court of Appeal was right, and accordingly that this appeal fails and should be dismissed with costs.

VISCOUNT FINLAY (read by LORD SUMNER). My Lords, the question in this case is whether part of the George V. Dock is assessable as "land covered with water" only in the proportion of one-quarter of its nett annual value.

The Local Government Act, 1899 (62 & 63 Vict. c. 14), made provision for the establishment of metropolitan boroughs in accordance with schemes to be framed under the Act. Sect. 10, sub-s. 1, of the Act enacts as follows: "A scheme under this Act shall provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers rate and separate lighting rate, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments."

The effect of this enactment came under consideration in the case of *London and India Docks Co.* v. *Borough of Woolwich.*(1) It was there held by the Court of King's Bench that the section preserved the partial exemption in the case of docks existing at the time when the new legislation took effect. There was no appeal against this decision, and its correctness is beyond dispute. The Court consisted of Lord Alverstone C.J., Darling J. and Channell J. Channell J., in his judgment, said this: "I think I ought to add that in my view so far as any future hereditaments are concerned, that is, if a new dock is made in Woolwich, it is intended that the general law should apply to these hereditaments." The other members of the Court expressed no opinion on this point. In the present case the question is whether the view thus expressed obiter by Channell J. is right.

(1) [1902] 1 K. B. 750, 759.

The George V. Dock was authorized in 1901, but its construction was not begun until 1912. The question is whether under the words of this sub-section a portion of that dock which on its construction became "land covered with water" should be assessed at a less amount under the concluding words of the sub-section. Before the Act of 1899, land covered with water in this area was assessable in the proportion of one-quarter part only of the nett annual value by s. 211 of the Public Health Act, 1875. The benefit, however, of this partial exemption has never been enjoyed by the land now in question, inasmuch as it was only on the construction of the George V. Dock in 1912 and the subsequent years that it became "land covered with water." It is contended for the Port of London Authority that the words which I have quoted confer this partial exemption upon hereditaments covered with water as a class irrespective of the date at which the hereditament in question became "land covered with water."

The rate now in question is a general rate for the metropolitan borough of Woolwich, in which the Port of London Authority are rated on the value of the dock, no allowance being made in respect of the fact that the land in part is covered with water. The London quarter sessions dismissed the appeal against the rate, stating a special case upon the question whether the Port of London Authority are entitled to the partial exemption. The King's Bench Division held that they are so entitled. This decision was reversed by the Court of Appeal (Lord Sterndale M.R., Warrington and Scrutton L.JJ.), who held that the rate must be on the full value, as the hereditament is not one which was land covered with water until the construction of the dock long after the Act of 1899. The Port of London Authority now appeal to your Lordships' House, asking that the judgment of the King's Bench Division should be restored.

In my opinion the decision of the Court of Appeal was right. Sect. 10, sub-s. 1, of the Act of 1899 enacts that provision shall be made in any scheme for protecting the interests of owners and occupiers of any hereditament which

H. L. (E.) 1924 PORT OF LONDON AUTHORITY v. WOOLWICH CORPORATION. Viscount Finlay.

is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments. The London Rating Scheme, 1901, provides that, as from April 1, 1901, all money to be raised by rates shall be paid out of a general rate and that a separate sewers rate and a separate lighting rate shall not be levied, and that in levying the general rate after April 1, 1901, effect shall be given to any exemption from any existing rate by means of the deduction of a proportional part from the amount of the general rate. The expression "existing rate" is defined in cl. 6 as meaning any rate leviable before April 1, 1901. These words appear to me to point clearly to the case of hereditaments which at the date indicated by the adverb "now" in the sub-section enjoyed a complete or partial exemption from any rate. There was provision under the Public Health Act for partial exemption in the case of land covered with water, but the land now in question did not become land covered with water until long after the passing of the Local Government Act, 1899. No provision is made of a general nature in favour of hereditaments consisting of lands covered with water at whatever date they may come into existence. To fall within the words of the sub-section the exemption, complete or partial, must have been enjoyed by the hereditament at the time when the new system was introduced. In the present case, the London (Woolwich) Scheme was confirmed by Order in Council on August 7, 1900, and the London (Rating) Scheme on March 9, 1901. Any hereditament which is to get the benefit of s. 10, sub-s. 1, must be one which enjoyed complete or partial exemption from rates when the schemes came into operation. This dock was not begun till 1912, and no hereditament can fall within the provisions of s. 10, sub-s. 1, unless its case is covered by the words of that sub-section. For the purposes of the present case it is quite immaterial whether the precise date to be taken is that of the Act itself or that of the scheme. Personally, I think that the adverb "now" in s. 10, sub-s. 1, denotes the time when the new system came into force, probably April 1,

1901 (see the London (Rating) Scheme, 1901, s. 1, sub-s. 1, s. 2, sub-s. 1, and s. 6, and the London (Woolwich) Scheme, 1900, s. 2), but of course the same result would follow if the date of the passing of the Act be regarded as the critical date.

I regret that in this case my opinion should be in conflict with that of the Lord Chief Justice. I beg to refer to his observations as set out in the Appendix, page 24E to page 25C. He treats the partial exemption as being conferred in respect of a certain class of hereditaments—namely, land covered with water. I feel unable to adopt this view. It appears to me that the benefit of the partial exemption is given not to all who may be owners or occupiers of land covered with water whenever it acquired that character, but only to owners or occupants of parcels of land which enjoyed the exemption before 1901. I agree with the view taken by the Court of Appeal upon this subject.

I think that the appeal ought to be dismissed.

LORD ATKINSON. My Lords, the question for decision in this case, by no means an easy one to solve, was by Mr. Macmorran on behalf of the respondents, as I understood him, neatly stated in the following words, namely: Whether the object and effect of the tenth and nineteenth sections of the London Local Government Act, 1899, and of the schemes made thereunder affecting the borough of Woolwich were mainly to protect and perpetuate certain exemptions from rating theretofore enjoyed by the owners and occupiers of certain kinds of property, or in addition to create de novo similar exemptions in favour of persons who were not at the date of the passing of this Act or of these schemes owners or occupiers of any property of the kind mentioned, but might possibly thereafter become so; and he directed his argument to show that this latter class of persons could not under the aforesaid statutory enactment ever become entitled to exemptions similar to those enjoyed by the others.

The decision in the case of *London and India Docks Co.* v. *Borough of Woolwich* (1) supports to a certain extent

(1) [1902] 1 K. B. 750.

H. L. (E.) 1924 PORT OF LONDON AUTHORITY v. WOOLWICH CORPORATION. Lord Atkinson.

Mr. Macmorran's contention. In that case the respondents had been, before the passing of this statute of 1899, owners and occupiers of a certain hereditament, land covered by water, and had enjoyed the privilege of only being assessed in respect of it to the general district rates for Woolwich at one-fourth of its net annual value. It was decided that the respondents were entitled to continue to enjoy this privilege in the future, or to have their right to it considered in the manner directed by the statute, because they had enjoyed it before and at the time of the passing of that Act. Channell J., however, in giving judgment, drew markedly the distinction the respondents insist upon in this case—namely, the distinction between the protection and preservation under new conditions of the privileges enjoyed in the past in respect of a particular kind of hereditaments, and the creation of similar privileges in favour of persons becoming owners or occupiers of hereditaments only coming into existence for the first time in the future. He said, p. 759 of the report: "I entirely agree with what my Lord has said, but I think I ought to add that in my view, so far as any future hereditaments are concerned—that is, if a new dock is made in Woolwich—it is intended that the general law shall apply to those hereditaments. I understand the meaning and intention of s. 10, sub-s. 1, of the London Government Act, 1899, and the scheme made under it to be to prevent particular persons in Woolwich, who were the owners or occupiers of hereditaments to which the exemption applied, from being rated any higher in the future. It is for that reason that I do not think that our present decision that the partial exemption of the appellants' premises continues is in any way contradictory to the express enactment, in s. 19, sub-s. 1, that Woolwich should be placed under the general law applicable to metropolitan boroughs. I think that Woolwich is placed under the general law applicable to the Metropolis with regard to the future, and that if a new dock is made it will come under that general law."

This latter statement was undoubtedly made obiter, but I must say it appears to me to be very rational, and on

examination of the relevant statutes it appears, I think, to be sound.

The hereditament the subject matter of this appeal is the King George V. Dock, land covered by water. The construction of this dock by the London and India Docks Company (New Works) was only authorized by 1 Edw. 7, c. ccxxvii, passed in the year 1901. Its construction was only commenced in August, 1912, so that it did not become a rateable hereditament till long after April 1, 1901.

If Channell J.'s view as to the operation and effect of s. 19, sub-s. 1, of the Act of 1899, be right, then the appellants would not, by becoming owners of this dock so late as 1912, become entitled to have it assessed at only one-fourth of its annual value, and the appeal would fail.

The contention of the appellants, as I understand it, is on the other hand this, that by the joint operation of the provisions of the 211th section of the Public Health Act of 1875 and the 10th and 19th sections of the aforesaid statute of 1899, the owners and occupiers for the time being of any one of the class of hereditament mentioned in the 211th section, whenever it came into existence, would be entitled to this partial exemption from general district rates levied in the parish of Woolwich. They contend that it is the character of the hereditament which gives this privilege to the owner or occupier of it for the time being, and not the date of its creation.

The legislative enactments upon which the question for decision more immediately turns are the 211th section of the Public Health Act of 1875, the 10th and 19th sections of the London Local Government Act of 1899, the London Rating Scheme of 1901, and the 213th section of the Municipal Corporation Act, 1882. The first of these runs as follows: Sect. 211. "With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect (namely)—(1.) General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full

H. L. (E.) 1924 — PORT OF LONDON AUTHORITY v. WOOLWICH CORPORATION. — Lord Atkinson.

net annual value of such property, ascertained by the valuation list for the time being in force . . . . subject to the following exceptions regulations and conditions; (namely,)." Then follows a long list of different kinds of hereditaments—namely, land used as arable, meadow or pasture ground only, or as woodland, market gardens or nursery grounds, and the occupier of land covered with water, or used only as a canal or towing path, or as a railway constructed under the powers of an Act of Parliament for public conveyance—which are to be assessed in respect of the same at one-fourth part only of the net annual value thereof. With the exception of land covered with water, it is the use to which the hereditament is put which secures the abatement in the assessment of it, so that if the user should be altered the right to the abatement would be lost. For instance, if a pasture field was turned into a bleach green. It would appear to me that the abatement is given because it is assumed that lands used in the manner mentioned gain but little advantage from the services upon the procurement of which the general district rates are expended.

Sect. 207 of this same Public Health Act of 1875 provides that all expenses incurred or payable by an urban authority in the execution of the Act and not otherwise provided for are to be charged upon and defrayed out of the district fund and general district rate leviable by them under the Act subject to certain exceptions which are irrelevant to the present case. By the section next but one to this latter—namely, s. 209—it is provided that in the district of every urban authority where expenses under this Act are directed to be defrayed out of the district fund and general district rate, there should be continued or established a fund called the General District Fund. A separate account called the District Fund Account of all moneys carried under the Act to the account of that fund shall be kept by the treasurer of that authority in defraying such of the expenses chargeable thereon under the Act as they shall think fit. It is in respect of these general district rates that exemptions are given under the 211th section already quoted.

On examination of the provisions of the tenth section of the Act of 1899 and of some of the earlier statutes, it would appear to me to be clear that the interests by this latter provision directed to be protected were the interests of those owners and occupiers of hereditaments which were exempted totally or partially from being assessed to the payment of a separate sewer rate or of a separate lighting rate—the very two rates which are by that section discontinued. The funds needed to meet the expense of the services to which these special rates were devoted will, thenceforth, be raised as part of the general rate. No exemptions from this general rate are expressly given, and the owners and occupiers of these hereditaments would, but for this provision, be proportionally damnified. They are by it protected to some extent from loss. But it is difficult to see on what ground the owners and occupiers of hereditaments, which never were assessed to either of these separate rates, and were not in existence till after those separate rates had been discontinued, can be entitled to interests such as those which were to be protected.

The Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), by its 68th and several succeeding sections, imposed on the several vestries and districts boards named in the Schedules to the Act the obligation of making and keeping in repair such sewers as were required for their parishes or districts, as the case might be. By its 158th section these same bodies were empowered by order to require the overseers of a parish or parishes in their respective districts to levy and pay over to their treasurer or to a bank named in the order such sum as the vestry or board respectively might require for the execution of the Act. Each vestry or board was bound, however, to distinguish in their respective orders the sums required to defray the expenses of constructing, altering or maintaining and cleansing sewers or otherwise connected with sewerage, and also where the Lighting and Watching Act of 1833 or any other Act by virtue whereof land is rated in respect of lighting expenses at a less amount in proportion to its annual value

H. L. (E.) 1924 — PORT OF LONDON AUTHORITY v. WOOLWICH CORPORATION. — Lord Atkinson.

than houses, or is wholly exempt from being rated in respect of such expenses, is in force at the time of the passing of this Act, to distinguish as regards such parish or part thereof the sums required for defraying the expenses of lighting the parish or district from sums required for defraying other expenses of executing the Act. Neither the entire of this Act of 1855 nor the sections referred to have been repealed by the Public Health Act of 1875, or any other statute.

One thus finds in the passages cited a provision which subsequently developed into the separate sewer rate and the separate lighting rate mentioned in the 10th section of the Act of 1899. One finds in it a section, s. 163, which is practically the 211th section of the Act of 1875 in embryo, and in s. 165 it is provided that in respect of the lighting rate property other than land shall be rated at a rate in the pound three times greater than that at which owners of land shall be rated under such lighting rate. By the 102nd section of the Public Health (London) Act, 1891, it is provided, s. 207, and ss. 209 to 227 both inclusive of the Public Health Act, 1875 (which, of course, includes its 211th section, the construction of which is in controversy), shall apply to the parish of Woolwich, without prejudice, however, to the existing effect of the Metropolis Management Act of 1855 and the Acts amending the same, or to the powers, duties and liabilities of the County Council or the Local Board of Health of Woolwich under the latter Act.

On August 7, 1900, the London (Woolwich), 1900, Scheme, made under the Act of 1899, was confirmed by Order in Council. The first section is simply a reprint of s. 10, sub-s. 1, of this statute. The answer to it is that the dock named was not in existence at this date, and the owners and occupiers of it when it came into existence would not be exempt from any rate such as the sewage rate or lighting rate, or, indeed, any other.

This remark applies equally to sub-s. 2, s. 1, of the London (Rating) Scheme of 1901. That section deals with an exemption from any existing rate. The owners and occupiers of this dock had never been exempted from

any rate in respect of it, and therefore never possessed the interest in it which s. 10 aimed at protecting.

As this dock was not in existence either in 1875 or in the year 1899, nor even in the year 1901, and was never assessed for either a separate sewer rate or lighting rate, I think its liability to rates falls to be determined by the general law, not by the special provisions of the statutes passed at the different preceding periods mentioned, and that it is, therefore, liable to be assessed in respect of the general rate mentioned in s. 10 of the Act of 1899 irrespective of its provision as to the protection of the interests named therein.

The appeal in my opinion fails, and should be dismissed with costs.

LORD SUMNER. My Lords, I have had the opportunity of reading the opinion of my noble and learned friend on the Woolsack and I agree with it.

LORD WRENBURY. My Lords, I have formed an opinion which in material respects differs from the judgments which have just been delivered. I think the decision of the Divisional Court was right. I find myself in agreement with the judgment delivered in that Court by the Lord Chief Justice. In this ultimate Court of Appeal no useful purpose would be served by my repeating at length the reasoning of that judgment even though I added, as I could add, some further reasoning leading to the same conclusion. I therefore content myself by saying that for the reasons advanced by the Lord Chief Justice I think that the contention of the appellants is right, and that this appeal ought to be allowed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 22, 1924.

Solicitors for the appellants : *E. F. Turner & Sons.*
Solicitor for the respondents : *Sir Arthur Bryceson.*

[HOUSE OF LORDS.]

H. L. (E.)* 1924 *May* 9.

OFFICIAL RECEIVER AND LIQUIDATOR OF JUBILEE COTTON MILLS, LIMITED . . . . . } APPELLANT;

AND

LEWIS . . . . . RESPONDENT.

Company—Winding Up—Misfeasance Summons—Promoter—Secret Profits—Shares and Debentures—Allotment before filing Statement in lieu of Prospectus—Certificate of Incorporation—Conclusiveness as to Date—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 15, 16, 17, 82, *sub-s.* 1.

The respondent, as the Court found on the facts, was a promoter of a company formed for the purchase of a cotton mill and the carrying on of the business of cotton spinners. The memorandum and articles of association of the company were accepted by the Registrar of Joint Stock Companies on January 6, 1920, and the certificate of incorporation was dated on that day, but apparently it was not in fact signed by the registrar till January 8. On January 6 the company, before filing any statement in lieu of prospectus as required by s. 82, sub-s. 1, of the Companies (Consolidation) Act, 1908, allotted a large number of fully paid shares and debentures to the vendor as the ostensible consideration for the purchase, but really to provide for promotion profits. The greater part of these shares and debentures was transferred to the respondent, who obtained a considerable sum by realizing them, though the shares were in fact worthless. The company having been compulsorily wound up, the official receiver and liquidator issued a misfeasance summons against the respondent to render him liable for certain secret profits alleged to have been made by him as promoter. The respondent objected that there had been no valid issue or allotment of the shares and debentures alleged to constitute the profit:—

Held, (1.) that the certificate of incorporation was conclusive as to the date on which the company was incorporated, and that the words "from the date of incorporation" in s. 16, sub-s. 2, of the Act of 1908, which provided that the company from the date of incorporation mentioned in the certificate was a body corporate capable of exercising all the functions of an incorporated company, included any portion of the day on which the company was incorporated and did not mean "from the commencement of the next day"; consequently that the allotment of shares and debentures was not void on the ground that it was made before the company came into existence; (2.) (Lord Sumner expressing no concluded opinion on the point) that assuming that the allotment was void under s. 82, sub-s. 1, as having been made before

* *Present:* EARL OF BIRKENHEAD, VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER, and LORD CARSON.

a statement in lieu of prospectus was filed, the respondent, having been put by the company in control of something out of which he made a profit, was bound to account to the company for that profit.

Held (by Lord Sumner; Lord Dunedin expressing the contrary opinion), that an allotment of shares and debentures made before filing a statement in lieu of prospectus as required by s. 82, sub-s. 1, is not wholly void.

Dicta of Warrington J. and Swinfen Eady L.J. in *In re Blair Open Hearth Furnace Co.* [1914] 1 Ch. 390, 399, 407 discussed.

Observations of Lord Sumner as to the practice of the Registrar of Joint Stock Companies, in cases where everything is in order, of ante-dating the incorporation of a company to the date of the application for registration.

Decision of the Court of Appeal [1923] 1 Ch. 1 reversed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Astbury J. (2) on a misfeasance summons issued by the appellant, the official receiver and liquidator of the Jubilee Cotton Mills, Ld., against the respondent, Tom Lewis, under s. 215 of the Companies (Consolidation) Act, 1908.

The company was incorporated on January 6, 1920, and an order for the compulsory winding up of the company was made on March 15, 1921.

The summons claimed a declaration that the respondent was a promoter of the company and accountable to the appellant for the secret profit received by him on the purchase and resale of the Jubilee Cotton Mills, an account of such profit and payment by the respondent of the sum found due upon the account.

The respondent contended on the merits that he was not a promoter of the company as formed, but that the formation of the company was part of a fraudulent conspiracy on the part of Ernest Terah Hooley and others to obtain from him large sums of money, and that he in fact made no profit but sustained a severe loss.

The facts are fully stated in the report of the case before Astbury J., and are summarized in the judgment of Viscount Finlay.

Astbury J. found as a fact that the respondent was a promoter of the company, and that the secret profit received by him amounted to 35,390*l.*

(1) [1923] 1 Ch. 1. (2) [1922] 1 Ch. 100.

H. L. (E.) 1924

JUBILEE COTTON MILLS, LD. (OFFICIAL RECEIVER AND LIQUIDATOR) v. LEWIS

The Court of Appeal, by a majority (Warrington and Younger L.JJ.; Lord Sterndale M.R. dissenting), reversed the order of Astbury J.

The Master of the Rolls and Warrington L.J. agreed with the conclusion of Astbury J. on the facts, except that they were of opinion that the amount of profit found by him was subject to certain deductions.

Younger L.J. held that nothing effective had been done except under the direction of Hooley, and that the respondent was not in fact or in law the promoter of the company as formed.

Warrington L.J. was, however, of opinion that the shares and debentures which were received by the respondent were invalidly issued, on the ground that no statement in lieu of prospectus had been then filed to comply with s. 82, sub-s. 1, of the Companies (Consolidation) Act, 1908, and, consequently, that there was no profit for which the respondent could be held liable to account, and Younger L.J. agreed with this view of the law.

Lord Sterndale M.R. held, on the contrary, that, assuming that the allotment of shares and debentures was void as not complying with s. 82, sub-s. 1, the respondent, having been put by the company in control of something out of which he made a profit, was bound to account to the company for that profit.

1924. Feb. 4, 5, 7, 8. *Luxmoore K.C.* (with him *Wallington*) for the appellant. On the question whether the respondent was a promoter this House will not disturb the findings of the trial judge and of the majority of the Court of Appeal in the affirmative. On the question whether the respondent made a secret profit for which he was accountable to the liquidator it is objected on his behalf that there was no valid allotment of the shares and debentures which he received as promoter, first, because no statement in lieu of the prospectus had been filed with the registrar before allotment as required by s. 82, sub-s. 1, of the Companies (Consolidation) Act, 1908, and, secondly, because at the date of the allotment the company had not in fact been incorporated; and that consequently

there was not in the hands of the respondent any property of the company out of which a profit could be made. As to the first objection, s. 82, sub-s. 1, does not say that an allotment which does not comply with its provisions shall be void. The majority of the Court of Appeal, however, relying on the dicta of Warrington J. and Swinfen Eady L.J. in *In re Blair Open Hearth Furnace Co.* (1), have held that that is the effect of the sub-section. The dicta in question are obiter only and are open to review, and the view suggested by Astbury J.—namely, that the provisions of the sub-section are merely directory and intended to apply only to the period before a statement in lieu of prospectus is filed—is to be preferred for the reasons stated in his judgment: see Maxwell on Interpretation of Statutes, 6th ed., p. 369; *Lodge* v. *National Union Investment Co.* (2); *In re Suarez.* (3) On the true construction of the Act, reading s. 82 with the succeeding sections, particularly s. 86, there is nothing to make the allotment void. Even if the allotment was illegal the doctrine of estoppel applies: *Webb* v. *Herne Bay Commissioners.* (4) If the allotment was void the company could not complain. They could not say to the respondent that his shares were invalid, for he was not a shareholder, and they could not issue a further set of shares, because they would be estopped as against the purchasers. But the respondent has money in his hands as the proceeds of these shares and debentures; he has been put into possession of something, whether it be shares and debentures or pieces of paper, out of which he has made a profit, and he cannot be heard to say that the shares and debentures have been invalidly issued. As to the second objection, the certificate of incorporation is conclusive proof that the company was incorporated on January 6, 1920, and it is deemed in law to have been in existence on the whole of that day. As to the nature of a promoter's liability see *Carling's Case.* (5)

R. Fortune for the respondent. The respondent was not a

(1) [1914] 1 Ch. 390, 399, 407–8.
(2) [1907] 1 Ch. 300, 306.
(3) [1918] 1 Ch. 176, 199, 200.
(4) (1870) L. R. 5 Q. B. 642.
(5) (1875) 1 Ch. D. 115, 126.

H. L. (E.) 1924 JUBILEE COTTON MILLS, LD. (OFFICIAL RECEIVER AND LIQUIDATOR) v. LEWIS.

promoter of this company, because the company which he agreed to promote was not the company which was in fact incorporated. The mere fact that the respondent bought this property (if he did buy the property) with a view to forming a company does not make him a promoter: *Erlanger* v. *New Sombrero Phosphate Co.* (1); *In re Cape Breton Co.* (2); *Ladywell Mining Co.* v. *Brookes* (3); *In re Lady Forrest (Murchison) Gold Mine.* (4) Assuming that he was a promoter, he made no profit at the expense of the company. The only profit made was by the fraudulent unloading of worthless shares. That sum could be recovered by the purchasers of the shares, but it is not a profit which can be claimed by the liquidator: *In re Ambrose Lake Tin and Copper Mining Co.* (5) If the respondent made any profit it was not a secret profit, because the facts were known to the original allottees, who were either parties to the transaction or nominees of such parties. Further, the shares and debentures were not validly issued. The company was not incorporated at the time of the allotment. The allotment was on the afternoon of January 6, and the certificate was not signed till January 8. Assuming that the certificate of incorporation is conclusive as to the date (see s. 17, sub-s. 1), s. 16, sub-s. 2, says that "from the date of incorporation" the subscribers of the memorandum shall be a body corporate capable of exercising all the functions of an incorporated company. "From the date" there means that the day of incorporation is excluded, and that phrase is used for the purpose of avoiding all difficulties about portions of a day and all inquiries as to the precise time when the certificate was signed: *Goldsmiths' Co.* v. *West Metropolitan Ry. Co.* (6)

[LORD DUNEDIN referred to *Mercer* v. *Ogilvy.* (7)]

There is no ground for importing into the Act decisions on other branches of the law. The effect of that decision would be to alter "from the date" to "on the date." As to s. 82, sub-s. 1, the majority of the Court of Appeal were

(1) (1878) 3 App. Cas. 1218, 1236.
(2) (1885) 29 Ch. D. 795.
(3) (1887) 35 Ch. D. 400.
(4) [1901] 1 Ch. 582.
(5) (1880) 14 Ch. D. 390, 395.
(6) [1904] 1 K. B. 1.
(7) (1796) 3 Paton, 434.

right in holding that the failure to file a statement in lieu of prospectus rendered void whatever purported to be done. If the documents are invalid any one who took them would have a cause of action to recover back his money for want of consideration. The liquidator cannot say there is a profit arising from a non-existent document. If a trustee has got money on a worthless piece of paper the cestui que trust cannot claim the money, because the trustee would be bound to pay back the money to any one from whom he got it. The respondent would have no defence to an action by a purchaser of the shares for the return of the money. How then can the company claim the full value of the shares from the respondent? How is the respondent to be protected from having to pay the money twice over? Lord Sterndale, in making his observations on this point, did not accept the view that the shares were invalid under s. 82, sub-s. 1. The only basis of these misfeasance summonses is that the trustee is improperly withholding money in his hands from the cestui que trust.

The House took time for consideration.

1924. May 9. VISCOUNT FINLAY. My Lords, in this case application was made by the liquidator of the Jubilee Cotton Mills, Ld., on a misfeasance summons against the respondent Lewis to render him accountable to the company for the amount of certain concealed profits alleged to be made by him as a promoter of the company. The summons was heard by Astbury J., who made an order against Lewis, but this order was reversed by a majority in the Court of Appeal. On the present appeal the liquidator asks that an order should be made in the terms of the dissenting judgment of the Master of the Rolls.

The hearing of the summons before Astbury J. extended over twelve days and the evidence is very voluminous. It relates to the formation of the company to acquire and take over as a going concern and carry on the business of cotton spinners then carried on at Todmorden under the style of the Jubilee Cotton Mills. The evidence was summarized

H. L. (E.) 1924

JUBILEE COTTON MILLS, LD. (OFFICIAL RECEIVER AND LIQUIDATOR) v. LEWIS.

Viscount Finlay.

by Warrington L.J. in a statement made by him in the course of his judgment in the Court of Appeal, and this statement was accepted by the Master of the Rolls as correctly giving the result of the evidence as to promotion. It is as follows (1): "The scheme to which, early in December, 1919, Lewis became a party was that a company should be formed with a capital of 150,000*l.*, divided into shares of 1*l.* each, and with a power to create and issue debentures to be exercised in the first instance by the creation and issue of debentures for 30,000*l.* That this company should take the freehold of the mills and the other property above referred to for 180,000*l.* to be satisfied by the issue of debentures for 30,000*l.* and the allotment of fully paid shares for 150,000*l.* That Lewis should provide 30,000*l.* in two instalments of 15,000*l.* in cash as security, for which he should receive the debentures for 30,000*l.* That he should also receive 95,000 fully paid up shares of 1*l.* each, of which 20,000 were to go to Demery, leaving 75,000 at his own disposal. The remaining 55,000 shares were to go to the owner of the mill. It was further arranged that Demery was to carry out the details of the promotion and formation of the company, acting therein as the agent of Lewis."

To this statement must be added the fact that Lewis sold his 75,000 shares mainly to Hooley, and the price was paid to Lewis partly in cash and partly in shares in other companies. Demery was also a respondent on the misfeasance summons, but the present appeal is concerned only with Lewis.

The first question to be determined is whether Lewis was a promoter of the company. If he was he stood in a fiduciary position towards the company and would be liable to account to it for any secret profit made by him in connection with the purchase.

Astbury J., after a prolonged hearing, came to the conclusion that he was a promoter, and his conclusion on this point has the concurrence of Lord Sterndale M.R. and of Warrington L.J., but not of Lord Blanesburgh. In my opinion the decision of Astbury J. on this point was right. He had the great

(1) [1923] 1 Ch. 1, 19.

advantage of hearing and seeing the witnesses ; and the objections which were urged in argument in your Lordships' House to this conclusion, concurred in as it was by the majority of the Court of Appeal, appear to me to fail. It is, indeed, beyond doubt that the leading part in the promotion of this company was taken by Hooley, and the allegation of Lewis that he was himself defrauded by Hooley may be accepted. But the fact remains that Lewis took part in the promotion. The part he played was, no doubt, subordinate to that played by Hooley, but he acted on his own account, not as a servant or professional man. It appears to me impossible to frame any definition of the term " promoter " which would not include one who took the part which Lewis did in bringing this company into existence. Astbury J. sets out the facts in detail, and the fact, if it be one, that Lewis was himself one of Hooley's victims can afford no answer.

An attempt was made to exonerate Lewis from liability as a promoter on the claim that the company which he intended to promote was to have been a company of a different type from that which in fact came into being. It was said that he contemplated that the company should be one in which he himself, Fletcher the vendor, and Demery should be the only shareholders. But he was content to leave the matter to Demery and he never limited his authority in the manner suggested. He acquiesced in the shape which the company ultimately took. If the company proved not to be what he had authorized he should have withdrawn from the enterprise. On the contrary, he stopped on as promoter of the company, although it may not have been in the form which he had originally contemplated.

Cases have been referred to in which a person who had acquired a property was not held to be a promoter of a company afterwards formed to acquire it from him, but such authorities are irrelevant on the facts of the present case as to Lewis's share in the promotion of this company.

Lewis as a promoter is therefore liable to the company for the amount of any secret profit made by him on the sale by him of the 75,000 shares which he took.

H. L. (E.) 1924 — JUBILEE COTTON MILLS, LD. (OFFICIAL RECEIVER AND LIQUIDATOR) v. LEWIS. — Viscount Finlay.

It was, however, suggested that the profit was not secret. Astbury J. says (Appendix p. 577, letter G) that the signatory members were not proved to have had any knowledge of the interest of Lewis and others in the shares issued as fully paid up. It was, however, suggested before him (p. 597) and before this House that it should be inferred that the signatories were "nominees of Hooley and Demery with knowledge of the true facts, express or to be inferred, and that therefore there was sufficient disclosure to all the shareholders" (p. 597, E). Astbury J. refused to draw any such inference, and upon this point I will only observe that the contention would appear to be in substance that all the signatories were accomplices and, if so, it is not easy to see how their knowledge would help the case of the respondent. Knowledge on the part of accomplices cannot be put on the same level as knowledge by independent persons acting in the interests of the company as a whole. I think that the profit made by Lewis must be treated as secret profit and therefore the property of the company in the winding up.

There remains for consideration the question what for the purposes of the present application should be the measure of the liability of the respondent.

It was urged that the issue of these shares was void and that the shares were therefore worthless. This was put on two grounds. The first ground was that there was no prospectus and therefore that no shares could be issued until a statement in lieu of prospectus had been filed under s. 82, sub-s. 1, of the Companies Act of 1908.

I do not think that it is necessary in the present case to determine what is the effect of the issue of shares in contravention of the first sub-section of s. 82. I entirely agree with the observations of Lord Sterndale on this point (Appendix, pp. 617, 618). Lewis got from the company the power of disposing of these shares. As between the company and himself any profit which he made by disposing of them would belong to the company. His power of disposing of these shares was acquired by way of a secret profit and for any price which was obtained for them he would be accountable to the company. Whatever flaw there might be in the

shares, that could not justify him as against the company in keeping for himself what he had realized by disposing of them. As between himself and the company the price he got for such shares belonged to the company. The possibility of conflicting claims could not justify him in retaining it for himself as against the company.

It appears to me that precisely the same considerations apply to the second ground urged on behalf of Lewis under this head. This second ground was that the company was incorporated on January 6, 1920, as the certificate states, and the allotment of the shares purports to have been made on the same day, and that there is nothing to show that the allotment was made after the incorporation and that any allotment made before incorporation must be void. In my opinion, the answer made by Lord Sterndale to the first objection applies equally to this second objection. Even if it be assumed that the allotment should be held to have taken place before the incorporation and would therefore be a nullity, this would not entitle Lewis to retain as against the company the price he received for what were treated as shares. Lewis sold them as having been validly issued by the company. By s. 17 of the Act of 1880 the certificate is conclusive evidence that the registration was duly effected on January 6, and there is no evidence to show at what time the allotment of the shares was made. I share the doubts which the Master of the Rolls expressed as to the propriety of entertaining this point at all in the absence of evidence as to what exactly took place on registration, but even if the point were otherwise a good one, it could not avail the respondent who, being a promoter, dealt with these shares as having been validly issued and must account to the company for the profit he thereby made.

Only one point remains. The price was made up partly of money and partly of shares in other companies. I think that the sum for which Lewis is liable should be ascertained, as the Master of the Rolls held, by taking the portion paid in shares not at their nominal value but at their real value. With this variation, the order made by Astbury J. appears to me to be correct.

H. L. (E.) 1924 JUBILEE COTTON MILLS, LD. (OFFICIAL RECEIVER AND LIQUIDATOR) v. LEWIS.

My Lords, I am authorized to say that my noble and learned friend, Lord Birkenhead, concurs in this judgment, and my noble and learned friend Lord Carson concurs in the result.

LORD DUNEDIN. My Lords, on the first question I think it would be useless to amplify and impossible to improve upon the analysis and summary of the evidence given in the admirable judgment of Astbury J. It follows that Lewis was a promoter of the company, that he concealed from them that he was making profits in his transaction with them, and that he is bound to communicate the profit so made to the company as represented by the liquidator. This view of the facts was shared by two of the learned judges of the Court of Appeal. The dissenting judgment seems to me to be based on what is really a mistaken view—namely, that because Hooley was behind Lewis and was what I may term the arch-promoter, Lewis was not in fact the promoter. There is nothing against there being two promoters, each in turn securing some advantage for himself which he conceals from the company.

In the argument before your Lordships counsel laid great stress on cases which affirm that the purchaser of a property who contemplates the sale of that property to a company does not by that fact assume a fiduciary position in a question with the company. Such cases, undoubtedly sound, have here no application; in fact, to cite them is to remember the first proposition of the *Erlanger Case* (1) expressed in Lord Cairns's judgment and to forget the second. Lewis became a promoter not because he got the interest in the mill from Fletcher as arranged by Hooley, but because he set in hand the formation of a company to buy that interest.

There remains, however, another question, which I do not hesitate to say is one of delicacy and difficulty, because the appellant has to get rid of the very formidable view proponed by Warrington L.J.—namely, that what Lewis got from the company having been a void allotment of shares he cannot be asked to pay money for what was really worthless.

The first question which it is necessary to determine in order

(1) 3 App. Cas. 1218, 1236.

to raise this point is whether the allotment of the shares to Lewis' order was a void allotment. It was argued that it was so on two grounds: the first was that by s. 16, sub-s. 2, of the Companies Act, it is provided that from the date of incorporation mentioned in the certificate of incorporation the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company.

It was argued that "from the date" meant "on the day after the date," because it could not be conceived that the registration should take place at the first hour of the day, and the allotment here was made on the very day on which the certificate of incorporation is dated. There was an attempt made to show practice as to registration, but that I look on as quite futile in view of the explicit words of the Act in s. 16, sub-s. 2, and s. 17, sub-s. 1.

The case of *Mercer* v. *Ogilvy* (1) in this House seems to me to settle the question. The general point then settled was that in such cases you must take what is termed civilis computatio; that is to say, a computation of days and not de momento in momentum; that a day is taken as a whole irrespective of whether an event happens actually at one particular hour of that day or at another. I therefore do not think that the allotment is void on this ground.

The second question was that in terms of s. 82 no allotment may be made by a company which has not issued a prospectus unless there has been filed with the registrar a statement in lieu of a prospectus, and the statement in this case was admittedly not filed till after the date of the allotment.

On this point, although it was not necessary for decision, we have the opinion of Warrington J. and Swinfen Eady L.J., in *In re Blair Open Hearth Furnace Co.* (2), that the result is that any allotment is void.

I agree with the opinions, and particularly with that of Swinfen Eady L.J., who says he considers the matter settled by the case of *Whiteman* (3) in this House. He quotes some

(1) 3 Paton, 434. (2) [1914] 1 Ch. 390. (3) [1910] A. C. 514.

H. L. (E.) 1924 JUBILEE COTTON MILLS, LD. (OFFICIAL RECEIVER AND LIQUIDATOR) v. LEWIS. Lord Dunedin.

remarks made by myself in that case, but I wish to add that the same thing, though in somewhat shorter form, was said by Lord Macnaghten. I am, therefore, of opinion that the respondent does make out the first point—namely, that the allotment was a bad allotment. The result would doubtless be that any one holding such allotment could have resisted successfully being put on the list of contributors in the list of liquidation. That, however, does not end the question. The allotment, such as it was, was a thing on which the respondent was enabled to make, and did make, money.

My Lords, here I am constrained somewhat to differ from the opinion of Astbury J. and the Master of the Rolls. I do not differ from them altogether. I think that prima facie the promoter, who was a trustee in a question with the company, must make good to the company what he has obtained as trustee; but I do not think this duty is absolute, and irrespective of all other considerations as they put it, because I think this duty is limited to restoring what he truly and eventually gets, and not to what he may get at any time.

Let me put this case: Suppose that a bona fide purchaser from the respondent had discovered that the allotment was bad and sought for repetition of the money at the same time that the company discovered the secret profit, and that both had sued at the same time. Could it be supposed that the respondent would have been bound to pay both; and would not the claim of the bona fide transferee of the allotment have been obviously superior to the claim of the company? I would, therefore, qualify the general proposition thus, by saying that the promoter is bound to hand over what he has got quocunque modo from what is really the property of the company, provided that what he has got is not being vindicated from him in respect of a claim superior to that of the company. Now, when you apply this doctrine to the facts of this case, it is, I think, clear that this case does not fall within the terms of the exception. The respondent got from Hooley the fruits of his transference of his allotment. Hooley never could recover from the respondent, because he did all that he did with full knowledge and his eyes open. If to a small extent there was a transference to other parties,

these parties have never come forward, and, therefore, there is no reason why the respondent should not make over to the company what he got for the allotment of shares which he treated as his own but which, in fact, belonged to the company.

I, therefore, come to the same conclusion as Astbury J. and the Master of the Rolls, though I disagree with the absolute proposition laid down by them.

As to the amount for which the respondent is liable, I agree entirely with the modifications suggested by the Master of the Rolls upon Astbury J.'s judgment. I think it follows from the ratio of the whole judgment—namely, that the respondent must only make over what he really got and nothing more.

I agree with the judgment proposed.

LORD SUMNER. My Lords, Astbury J. finds that Mr. Tom Lewis agreed to promote a company and, by his agent Demery, did promote that company, ultimately called the Jubilee Cotton Mills Company; that out of debentures and fully paid shares, purporting to be allotted by it as the purchase consideration for its mill, but really to provide for promotion profits and without any corresponding benefit to the company itself, Mr. Lewis was given the control of shares to a large nominal amount and was enabled to dispose of them for substantial sums, which as profits came to his hands; and that the transactions by which these promotion profits were made by him and others associated with him were not disclosed to all the persons who were then members of the company. I think that the evidence fully bears out these findings. Why, then, should Mr. Lewis not account for these gains to the liquidator of the company in these proceedings?

He makes the following answers. First, that he received his share of the spoils on January 6, and that the company was not in fact incorporated till January 8; second, that the company, being one which issued no prospectus on or with reference to its formation, was forbidden by law to do what it in fact purported to do—namely, to allot shares and debentures —on January 6, not having then filed with the Registrar of

H. L. (E.) 1924 — JUBILEE COTTON MILLS, LD. (OFFICIAL RECEIVER AND LIQUIDATOR) v. LEWIS. — Lord Sumner.

Companies any statement in lieu of a prospectus such as the Companies (Consolidation) Act, 1908, s. 82, sub-s. 1, requires; third, that he never actually pocketed the money's worth of the shares or the debentures and may yet be obliged to make payments to third parties in consequence of what he has done with them; and fourth, that in any case his profit shares and debentures and their value are tainted with fraud and are, therefore, unfit to be claimed by a clean-handed company.

As to the first point, relating to the date of incorporation, it is not clear how far it would assist Mr. Lewis, if he could make it good, for, although the arrangements, under which he profited by his position as promoter, came to fruition on January 6, the company was in fact brought into existence at latest on January 8, and it lost in proportion as he had gained. Why, then, is it not the case in any event that Mr. Lewis is, "as regards obtaining any secret profit for himself, in the same position as if the company was existing at the time when the contract was entered into": Cotton L.J., *Bagnall* v. *Carlton* (1)? If the company, when subsequently formed, is burthened with the shares, for which it got nothing and Mr. Lewis got much, why should he not then account for them, even though when first he had control of them their existence, like that of the company, was still in futuro?

It is reasonably clear that in fact the registrar did not actually sign the certificate of incorporation till January 8, certain formalities not having been completed till that day, but the certificate itself, which bears date January 6, 1920, certifies that the company was incorporated on the 6th; and s. 17 of the Act of 1908 makes the statement conclusive evidence "that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with."

It is true that the section does not add "on and from this date," but I do not think this is necessary, for s. 16, sub-s. 1, provides, "that on the registration . . . . the registrar shall certify . . . . that the company is incorporated," and, by sub-s. 2, "from the date of incorporation mentioned in the certificate of

(1) (1877) 6 Ch. D. 371, 407.

incorporation, the subscribers . . . . shall be a body corporate . . . . capable forthwith of exercising all the functions of an incorporated company." I think it is now well settled that in a statute such as this "from the date of incorporation mentioned in the certificate" means (in the present case) "from some part of January 6" and not "from no part of that date but from the earliest part of the next day," and that the law does not in this connection divide a day into hours and minutes, but means by a day, the date of which is given, the whole of that day. We must accordingly take it that the company was, from the commencement of January 6, "a body corporate . . . . capable forthwith of exercising all the functions of an incorporated company" limited by shares, and must be taken to have been already born at the moment of allotment, whatever the actual fact may have been.

Before considering the next point—namely, how far this status and capacity are affected by subsequent sections, especially by s. 82, sub-s. 1, I wish to draw attention to the following matter. In the Court of Appeal a statement was admitted, which was made by a staff clerk in the office of the Registrar of Joint Stock Companies, and was, I have no doubt, as exactly and responsibly made as if it had been sworn to, which sets out the practice and procedure of that office. From this it appeared that the practice is, in cases where everything is found to be in order, to date the certificate of incorporation as of the day when the papers, requisite for the registration of a company, are delivered to the office. In the ordinary course of office routine a substantial time is occupied by examination and other necessary proceedings—in this case forty-eight hours—but the certificate when signed bears the date of the day when the papers were first handed in to support the application for registration. He says in conclusion: "The registration of the memorandum of association is effected by the registrar signing the certificate of incorporation. Not until then is the official record of the registration entered in the Office Register of Companies and the name and number inserted in the public index. . . . . The certificate is antedated to the

H. L. (E.) 1924

JUBILEE COTTON MILLS, LD. (OFFICIAL RECEIVER AND LIQUIDATOR) v. LEWIS.

Lord Sumner.

6th January for the reason that that is the date of application for registration and the date upon which the fees are paid."

No doubt it is thought that a diligent applicant, who has done all that was required of him at the outset, ought not to be prejudiced by a lapse of time, which is only made necessary by the routine of the office, but I think it has been overlooked that the certificate is conclusive evidence and under this procedure makes the date of incorporation, after which the company is forthwith capable of acting as a company, a date substantially earlier than that on which the registrar, being satisfied that he ought to do so, signs the certificate and so completes the company's incorporation. Nothing in the statute authorizes the registrar and his officers to antedate the incorporation. No doubt it may be said that the file, which is open to the public, is only made up after the registrar signs the certificate, and, therefore, that as regards those who come to search it no harm is done, but this is not enough. As this case shows, the practice also lends, or may lend, a validity to action, taken when the company is not yet incorporated, that it would otherwise lack, and the statute confers no authority on the registrar to create an ex post facto regularity by making on the face of his certificate a statement which is conclusive evidence of the truth of something that is not the fact. A revision of this practice might well be considered.

My Lords, as to the second point, I think that s. 82 does forbid the company to do what those, who then manipulated it, caused it to purport to do on January 6, but I cannot see that the company is therefore entitled, as was suggested, to treat this allotment now as voidable. Whatever possibility there may be of saying that, in the case of a natural person, a statutory avoidance of his liability is one which he need not insist upon unless he chooses, the same cannot be predicated of artificial persons in the same measure, if at all. Sect. 82, sub-s. 1, is couched in the terms of a categorical imperative and constitutes a restriction upon the company's legal capacity for action. An artificial person is the creation of the law; how can it elect to do what its creator says it shall not do at

all? It has no free will; no power of its own to obey or disobey. Nor, again, is this restriction imposed simply for the benefit or protection of the company. It would appear that members of the public, likely to be led to deal with the company, are also entitled to the benefit of the section and are intended to enjoy the means of knowing what purports to be the condition of the company's affairs, even though it be inaccurate (*In re Blair Open Hearth Furnace Co.* (1)), before they can become bound to it by a purported allotment of its shares. If so, the company cannot treat as merely voidable something which, in the interest of strangers, as well as of itself, the Act has forbidden to be done.

There is, however, the further question—is the premature allotment of shares absolutely ultra vires, so that it has no effect, though all the forms of allotting have been completed, or is it an act which the company is competent to do, having been incorporated, but is forbidden to do, not having duly filed its statement of affairs? In the first event, as between the company and Mr. Lewis, nothing happened, and what he sold to Mr. Hooley was worth even less than they both knew it to be. As between these persons no estoppel arises, since both knew all the facts, and as between the company and other persons, to whom Mr. Lewis passed shares, any estoppel could have arisen only after Mr. Lewis had done with the matter, and must have arisen out of conduct on the part of the company, to which he was a stranger. In the second event, however, it is not the case that nothing happened, but only that something was done, which ought not to have been done, and the mere possibility that the company might be bound by the allotment thereafter would be sufficient to justify a claim for an account against Mr. Lewis for the profits made by putting the company in a position of contingent liability.

On examination of the Act of 1908 it appears to me, with all respect to Warrington L.J., who thought otherwise, that the allotment of January 6 was not ultra vires altogether. The company had then been incorporated, and as such was capable

(1) [1914] 1 Ch. 390.

H. L. (E.) 1924

JUBILEE COTTON MILLS, LD. (OFFICIAL RECEIVER AND LIQUIDATOR) v. LEWIS.

Lord Sumner.

of allotting its shares, unless its capacity in that regard is taken away. I do not think that the prohibiting words of s. 82, sub-s. 1, take away the company's capacity. They only prohibit its exercise. Words which say that a person shall not act in a certain way are not apt words to show that he is not and shall not be able so to act at all. They assume the power and try to restrain it. It is true that the section does not impose any penalties, either on the company or on the directors, if the prohibited thing is done; but ss. 85 and 86, sub-s. 1, provide for a very similar matter, in language not substantially different, and it seems to me not only that they assume that a prohibited issue, if made, may nevertheless bind the company, but also that they were superfluous, if the effect of s. 82 was to make the issue thereby forbidden an ultra vires act and a nullity. Sect. 85 says that "no allotment shall be made of any share capital of a company offered to the public for subscription unless" certain conditions are complied with, and s. 86 says that, if an allotment in contravention of s. 85 is nevertheless made, the applicant shall have one month after the company's statutory meeting, but no more, within which to avoid the transaction. Not only does this assume that certain shares allotted in contravention of the Act will bind the company, unless the allottee takes action to the contrary, but, if the company offering its share capital to the public for subscription was one which issued no prospectus on or with reference to its formation, and if it had failed to file a statement in lieu of a prospectus (a case quite within the more general words of s. 85, sub-s. 1), ss. 82 and 86 would be in conflict unless s. 82 were read, as I think s. 86 must be read, as recognizing the ability of the company to make the allotment, though directing it first to file its statement.

Accordingly, I do not think that s. 82, sub-s. 1, assists the respondent's argument, unless it goes the full length of making the events of January 6 wholly null. If so, I need express no opinion, which, indeed, ought not to be done in their absence, as to the rights by estoppel of those persons to whom the company has subsequently issued certificates

of shares purporting to be held by them; nor need I discuss the view of Lord Sterndale that, even if the allotment was wholly void, profitable dealings by Mr. Lewis with the shares purporting so to be allotted would involve him in an account of those profits and in payment to the company, though I am far from expressing dissent from it. For the reason given above, I think that the action of Mr. Lewis, particularly on January 6, involved the company in at least a potential liability to recognize these shares, which constituted for Mr. Lewis a promoter's profit of value, though no consideration for them was received by the company, and, the same thing applying to the debentures, I think he must give up his gains as to both.

In the course of his judgment in the action brought by Mr. Marple (1), Russell J. said of Mr. Lewis, when describing his relations with Mr. Ernest Terah Hooley, Mr. Demery and their associates, that he had fallen among thieves. I do not wish to dissent from the expression, but it seems to me that the very most has been made of it. When Mr. Lewis's share of the promotion profits had come to his hands on January 6 he had already done very well out of the Jubilee Cotton Mills. It was a pity that he could not let well alone, for, before he had done with him, Mr. Hooley had got out of Mr. Lewis most of his share of those gains, and not many minutes had passed before this process was begun. It may be taken (without prejudice to what Mr. Hooley might like to say about the matter) that Mr. Lewis was got the better of by Mr. Hooley not less neatly than were the mere outsiders, to whom the bulk of Mr. Lewis's profit shares were ultimately transferred by Mr. Hooley.

On this, Mr. Fortune, who certainly left no stone unturned on behalf of his client, and indeed raised several points of equal novelty and interest, strongly urged on your Lordships, as I understood him, the following contention. Any shares that came to Mr. Lewis bore so strongly the dubious imprint of Mr. Hooley's fingers, that the resulting profit really was not fit to be transferred to the Jubilee Cotton Mills. I think this rather overlooks the object of the rule as to an agent's

(1) Unreported.

H. L. (E.) 1924

JUBILEE COTTON MILLS, LD. (OFFICIAL RECEIVER AND LIQUIDATOR) v. LEWIS.

Lord Sumner.

secret profits, which I take it is to check these breaches of duty by making them not worth while. No money could be more tainted than a bribe paid or promised to an agent to induce him to betray his master, yet both briber and bribee have to hand it over; after all, non olet.

It is suggested that somebody—Mr. Hooley or another—may still have some claim on Mr. Lewis for some participation in these transactions. It may be so, though Mr. Hooley appears to be out of harm's way, and the other parties have made no signs so far; but in any case I cannot accept the contention that an agent can escape accounting for secret profits, which have come to his hands, merely by saying that others have claims upon him too. There is no general rule that an agent who has made a secret and improper profit can, as it were, interplead and, resigning his gains, leave the opposing claimants to fight out their claims to the corpus delicti behind his back and between themselves. He may have to account to his principal for his profits and to make compensation in damages to his victim for his fraud, if he has been party to any. Of course, if something has come to his hands which still belongs to another and can be retrieved, either by an action for the specific thing or by a tracing order or otherwise, the profit has not really come to his hands so as to be his own at all, and he cannot be made to account for what still belongs to some one else, but there is no such case here. Nor is there any question here of the principal having to affirm some improper action of the agent, in order to recover in his name profits not yet got in by him. No doubt, if the theory on which equity first required an agent to disgorge his secret profits is, as has sometimes been said, that he has made them on his principal's behalf and for his use, it is hard to see how anything done fraudulently by the agent can have been deemed to have been done for the use of the principal, however profitable it may have been to the agent himself. Equally, on the other hand, it is hard to see on what equitable ground it can be said that, if an agent secretly makes an honest profit, he must give it up, but, if he has made it by cheating a stranger, he can keep the money himself.

On the facts of the present case, however, Mr. Lewis has actually got the profits of his promotion, sadly diminished, it is true. He did not cheat anybody; he was cheated himself. He is not exposed to any claims. Fortunately for himself his opponents have been otherwise dealt with. No contracts of his, tainted or not, have to be adopted or put in suit by the liquidator. Mr. Lewis simply wants to keep what he still has left and cannot quite see how to manage it. He accordingly fails to lay a foundation for these interesting arguments. He has been acquitted of all fraud and no one now charges him with any. By common consent he was Mr. Hooley's victim, not his accomplice, and, if the result of this is to deprive him of a possible opportunity of keeping his money at the cost of his reputation, he must console himself by reflecting that the price of a good name is far above rubies, and that he is not the first person who has had to cry "all is lost save honour!"

I think the appeal should be allowed with the modification as to the amount to be accounted for, which was conceded by the appellant's counsel.

Order of the Court of Appeal reversed: Further ordered that the sum for which the respondent is liable should be ascertained by taking the portion paid in shares of other companies not at their nominal value but at their real value, and that the order of Astbury J. be varied accordingly, and that subject to such variation the said order be restored. The respondent to pay the costs in the Courts below, and also the costs of the appeal to this House. Cause remitted back to the Chancery Division (Companies Winding Up) of the High Court to do therein as shall be just and consistent with this judgment.

Lords' Journals, May 9, 1924.

Solicitors for the appellant: *Cohn, Seligman & Bax.*

Solicitors for the respondent: *Grundy, Kershaw, Samson & Co.*

[PRIVY COUNCIL.]

J. C.* 1924 May 30.

MAYSON . . . . . APPELLANT;

AND

CLOUET AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS, SINGAPORE.

Vendor and Purchaser—Purchaser failing to pay Balance of Price—Rescission by Vendor—Claim to recover Instalments of Price—Construction of Contract.

A contract for the sale of land provided that a deposit should be paid immediately, that two instalments of cash, being 10 per cent. of the rest of the agreed price, should be paid at certain dates, and that the balance of the price should be paid within ten days of the production of a certificate that certain buildings upon the land were completed; if the purchaser failed to comply with the conditions of the contract his deposit might be forfeited and the land resold. The purchaser paid the deposit and the two instalments, but failed to pay the balance of the price at the stipulated time. The vendor rescinded the contract. In an action claiming a return of the instalments paid:—

Held, that the rights of the parties depended upon the contract; and that, although the purchaser was in default, the instalments were recoverable, since the contract distinguished between the deposit and the instalments and provided for a forfeiture of the deposit only.

Howe v. *Smith* (1884) 27 Ch. D. 89 approved and applied.

Dictum of Bankes L.J. in *Harrison* v. *Holland* [1922] 1 K. B. 211, 213 disapproved.

Judgment of the Supreme Court reversed.

APPEAL (No. 147 of 1923) from a judgment of the Supreme Court of the Straits Settlements, Settlement of Singapore, dated December 14, 1922, affirming a judgment of Shaw C.J.

The action was brought by the Official Assignee, for whom the present appellant was substituted, against the respondents to recover $50,000 paid to the respondents on account of the purchase price for certain land agreed to be sold to one Sim Choon Kee, deceased, less a sum due to the respondents for interest.

The facts of the case, including the material terms of the contract of sale, appear from the judgment of the Judicial Committee.

**Present:* LORD DUNEDIN, LORD PHILLIMORE, and LORD CARSON.

The action was heard by Shaw C.J. and was dismissed; upon appeal the judgment of the learned Chief Justice was affirmed. The grounds of the decisions are stated in the present judgment.

1924. May 8, 9. *Luxmoore K.C.* and *A. Underhill* for the appellant. Upon the purchaser failing to pay the balance of the price when due the vendor could elect either to treat the contract as rescinded or as subsisting: *Johnstone* v. *Milling*. (1) By the letter of December they elected to rescind. Having done so they are not entitled to retain the instalments. It is conceded that the deposit is not recoverable: *Palmer* v. *Temple* (2); *Ex parte Barrell*. (3) But the instalments were not part of the deposit, and those decisions have no application. The rights of the parties depend upon the contract: *Howe* v. *Smith* (4); it provides that on default by the purchaser the deposit may be retained, but makes no similar provision as to the instalments. There is no decision which decides that a purchaser in default cannot recover an instalment of the price paid by him. Two dicta were relied on in support of that view, but they are erroneous; the first was by Cozens-Hardy J. in *Cornwall* v. *Henson* (5), and the second by Bankes L.J. in *Harrison* v. *Holland*. (6) The first dictum was founded upon *Whincup* v. *Hughes* (7), but that was a case of impossibility of performance, not of rescission; the dictum does not seem to have been approved upon appeal. (8)

Upjohn K.C. and *Harman* for the respondents. The purchaser having repudiated the contract by not paying the balance of price cannot recover the instalments. His only right is to apply for relief from a forfeiture, as in *Steedman* v. *Drinkle*. (9) Even if the vendor rescinded, the contract cannot be treated as if it had not existed; the payment of instalments was provided for the purpose of the building

(1) (1886) 16 Q. B. D. 460.
(2) (1839) 9 Ad. & E. 508.
(3) (1875) L. R. 10 Ch. 512.
(4) 27 Ch. D. 89.
(5) [1899] 2 Ch. 710, 715.
(6) [1922] 1 K. B. 211.
(7) (1871) L. R. 6 C. P. 78.
(8) [1900] 2 Ch. 298.
(9) [1916] 1 A. C. 275.

J. C. 1924 MAYSON v. CLOUET.

operations. The correspondence shows that the vendors did not elect finally to rescind. The observations of Cozens-Hardy J. in *Cornwall* v. *Henson* (1) cannot be regarded as obiter; his judgment was affirmed on appeal (2) without disapproval of the observations, which were followed in effect by Bankes L.J. in *Harrison* v. *Holland*. (3)

Luxmoore K.C. replied.

May 30. The judgment of their Lordships was delivered by

LORD DUNEDIN. On September 11, 1919, the respondents, who were owners of a piece of ground in Singapore, where buildings were being erected by them, entered into an agreement with one Sim Choon Kee for the sale of the same.

The terms of the contract, so far as is material to the questions which have arisen, are as follows: "Clause 1.—The vendor agrees to sell and the purchaser agrees to purchase free from encumbrances the premises described in the schedule hereto at the price of $250,000 to be paid as follows, that is to say the sum of $25,000 as a deposit immediately after the signing of this agreement, the further sum amounting to 10 per cent. of the balance within three months from this date and a further sum amounting to 10 per cent. of the then balance within six months from this date, and the balance of the said purchase money within 10 days of the production by the vendor to the purchaser or his solicitors of the municipal certificate of completion of the buildings now in course of erection on the said land. . . . . Clause 3.—In the event of either of the two instalments of 10 per cent. above referred to not being paid by the purchaser in terms herein stated the vendor shall be at liberty to cancel this agreement and all moneys paid to them under this agreement shall forthwith become forfeit to the vendors and for this purpose time shall be deemed of the essence of the contract. In case the purchaser shall make default in completing his purchase when the municipal certificate has been issued as aforesaid he shall pay to the vendors interest on the balance

(1) [1899] 2 Ch. 710, 715. (2) [1900] 2 Ch. 298.
(3) [1922] 1 K. B. 211.

then owing at the rate of 12 per cent. per annum from such date until the actual completion of the purchase. . . . . Clause 13.—If the purchaser shall neglect or fail to comply with the above conditions his deposit may be treated as forfeited and the vendor shall be at liberty with or without notice, and notwithstanding any pending negotiation proceeding or litigation to re-sell the property either by public auction or private contract at such time and under such conditions as he may deem proper and all expenses attending any such re-sale or attempted re-sale and any deficiency in the price obtained on a re-sale shall immediately thereafter be made good and paid to the vendor by the purchaser and shall be recoverable by the vendor as liquidated damages."

The deposit was duly paid. So also were the two instalments, so that no question could arise under the first portion of cl. 3. On November 4, 1920, the vendors intimated that the buildings had been completed and a certificate of fitness for occupation received from the municipal authorities and called on the purchaser to complete in ten days. He did not do so. On December 7 the vendors made some fresh proposition, but without prejudice to their rights. On December 14 they wrote as follows: "We are instructed by Mr. Clumeck to say that completion of the purchase must take place before the 31st instant and in this respect time is made of the essence of the contract. In default of completion the deposit will be forfeited and our client will re-sell and hold you liable for any damages he may suffer." Further correspondence followed with certain new proposals on the part of the purchaser, but on December 31, as the contract had still not been completed, the vendors wrote as follows: ". . . . The title is one with which we are acquainted and we are quite prepared to advise Mr. Sim Choon Kee to complete but he has continually put the matter off clearly with a view of finding the money, as is very evident from your letter in which you say that he would complete if the $350,000 is advanced on mortgage. Our client much regrets that he cannot allow any more delay and must consider the matter at an end and the deposits forfeited." Further

J. C. 1924 MAYSON v. CLOUET.

proposals of new terms of settlement were made but came to nothing.

Sim Choon Kee then died and the matter was taken up by his executors, who took the point that, as the matter had been declared closed by the vendors, they were entitled to a return of the instalments, though they admitted that the deposit must remain with the vendors as forfeited. The vendors contended that the instalments were just additional deposit. Eventually the present action was raised for return of the instalments. It was found that Sim Choon Kee's estate was truly bankrupt, and subsequently the Official Assignee of bankrupt estates substituted the present plaintiff for himself.

The case depended before Shaw C.J. He found that the instalments were not additional deposit, that the contract was put an end to by the letter of December 31, but that the plaintiff as representing Sim Choon Kee could not recover the instalments in respect that he was himself under breach of contract.

Appeal was taken to the High Court. That Court affirmed the finding that the instalments were proper instalments and not additional deposit, but the learned judges considered that the contract was not brought to an end by the letter of December 31. At the same time they indicated their opinion that the judgment of the trial judge was right, even though they had come to an opposite conclusion as to the ending of the contract.

It has not been contended before their Lordships that the instalments were anything but proper instalments. The idea that they were extra deposit is, therefore, and as their Lordships think rightly, out of the case. Their Lordships may say at once that they agree with the trial judge that the contract was put an end to by the letter of December 31. The view of the learned judges of the appellate Court is really rested on the fact that further negotiations took place. These negotiations, however, were all in the nature of proposals for a new and different contract. They came to nothing, and accordingly the parties were remitted to the status of December 31.

Now the letter of December 31 is perfectly clear and explicit. "The matter is at an end." The purchaser had been warned that the only extension of time over the ten days from November 4, which was the strict date under the contract, was till December 31. On December 31 he had failed to complete, but was in breach and, therefore, said the vendors, the matter is at an end. Now what is the meaning of this? Their Lordships do not think it necessary to inquire as to a matter on which there was much argument, whether the word "rescission" is used in various judgments in a settled or a varying sense. The law is quite plain. If one party to a contract commits a breach then if that breach is something that goes to the root of the contract, the other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract as at an end—i.e., no longer binding on him—while retaining the right to sue for damages in respect of the breach committed. The test in this case as to whether such an election had been made is a very simple one. Could the vendors on January 1 have sold to some one else without subjecting themselves to action at the instance of Sim Choon Kee for specific performance? Their Lordships are of opinion that they clearly could.

There remains, however, the question decided by the learned Chief Justice as to whether the instalments can be recovered, and various authorities were quoted to their Lordships.

Their Lordships think that the solution of a question of this sort must always depend on the terms of the particular contract.

In *Howe* v. *Smith* (1) 500*l.* was paid as deposit and part payment of the purchase money. The contract was to be completed by a certain date, and it was not so completed and the vendors sold to some one else. The purchaser sued for specific performance, which was refused, as he himself had been in default, and then, being allowed to amend his pleadings, he sued for return of the deposit. It was held

(1) 27 Ch. D. 89, 92, 97.

J. C. 1924 MAYSON v. CLOUET.

that the deposit being of the nature of a guarantee that the contract should be performed, was forfeited and could not be returned. Cotton L.J. says "the first thing one must look at is the contract," and Bowen L.J., "the question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract," and Fry L.J. to the same effect. Now, all the elaborate argument that followed as to whether the condition attached to that particular deposit was quite unnecessary if the case could have been solved by the simple proposition sought to be applied here, to wit, you are in default as to the contract and the party not in default may keep anything that he has got from the partial fulfilment of the contract. *Howe* v. *Smith* (1) clearly comes to this, that if the learned judges had held that the deposit was only part payment and not a deposit proper, they would have ordered its return. Fry L.J. put this very simply: "It (the deposit) is not merely a part payment, but is then also an earnest to bind the bargain." It is true that in that case the property had been sold by the vendor to some one else, but the position here, where the vendor stated that the contract was at an end, is precisely the same. He was free to sell, and it is immaterial whether he has actually sold or not.

Their Lordships' attention was called to a dictum of Bankes L.J. in *Harrison* v. *Holland*. (2) In that case there was provision for a deposit of 50,000*l*. and a further sum of 100,000*l*. as part payment of the price to be paid within a fortnight. Ex abundanti cautela the contract provided that in the event of non-completion the 50,000*l*. should be forfeited and the 100,000*l*. should not; but the Lord Justice, speaking of the 100,000*l*. as a part payment, says: "If nothing more had been said about it, as the contract came to an end in consequence of the purchaser's own default, neither they nor the assignee would have been able to get the money back." This remark is obviously obiter, as the contract did say something more about it. It is not in any way assented to by the two other judges of the Court of Appeal,

(1) 27 Ch. D. 89, 101. (2) [1922] 1 K. B. 211, 213.

and it is, their Lordships think, in conflict with what Lush J., who tried the case, had said, doubtless also obiter, in the Court below. (1) "The 100,000*l.* is not called a deposit; it is expressly stated to be in part payment of the purchase money, and so it is not money paid as a guarantee for the due performance of the contract. It is therefore not forfeitable." In any view their Lordships think the dictum of Bankes L.J. is unsound.

They, therefore, turn to the contract. This specially distinguishes in terms between deposit and instalments. It then specially deals in cl. 13 with what is to happen if the purchasers are in default. The deposit is forfeited, and that is all. It would seem to their Lordships quite clear that the instalments are not to be forfeited. The truth is that the defendant's contention really amounts to a claim to keep the instalments as liquidated damages for the breach of contract for which they are entitled to sue. This was the proceeding unsuccessfully attempted in the case of *Harrison* v. *Holland* (2), already cited.

Their Lordships will humbly advise His Majesty to allow the appeal and enter judgment for the appellant with costs in both Courts. The respondents will pay the costs of the appeal.

Solicitors for appellant: *Speechly, Mumford & Craig.*
Solicitors for respondents: *Whites & Co.*

(1) [1921] 3 K. B. 300. (2) [1922] 1 K. B. 211.

[PRIVY COUNCIL.]

J. C.* 1924 June 23.

HETHERINGTON . . . . . APPELLANT;

AND

SECURITY EXPORT COMPANY, LIMITED . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Certiorari—Collection of Tax—Warrant for Distress—Judicial or ministerial Act—Liquor Exporters Taxation Act, 1922 (12 *Geo.* 5, *c.* 3), *s.* 6.

By s. 3 of the Liquor Exporters Taxation Act, 1922, of New Brunswick, every person who has liquor (with certain exceptions) for export from the Province shall pay a tax thereon at a specified rate per gallon; by s. 6, in default of payment the tax may be levied by distress under a warrant signed by the Provincial Secretary-Treasurer, or, by s. 7, he may bring an action for its recovery; s. 9 authorizes the making of regulations for fixing and determining the amount of the tax:—

Held, that the inference from the provisions of the Act and the regulations thereunder was that the duty of assessing the amount of the tax rested with the Attorney-General for the Province, and that the Provincial Secretary-Treasurer had power only to determine whether the tax should be recovered by distress or by action; and consequently, that certiorari would not lie to bring into the Supreme Court of the Province a distress warrant signed by the Secretary-Treasurer for an amount so assessed, his act being ministerial and not judicial.

Judgment of the Supreme Court of Canada reversed.

APPEAL (No. 104 of 1923) by special leave from a judgment of the Supreme Court of Canada (June 15, 1923) reversing a judgment of the Supreme Court of New Brunswick, Appellate Division (November 24, 1922).

On the application of the respondents the Supreme Court of New Brunswick made an order absolute for a writ of certiorari and an order nisi to quash a distress warrant signed by the appellant, the Provincial Secretary-Treasurer of New Brunswick, under s. 6 of the Liquor Exporters' Taxation Act, 1922, of that Province.

On November 24, 1922, the Appellate Division discharged the order upon a preliminary objection that the distress

* *Present:* LORD BUCKMASTER, LORD DUNEDIN, LORD PHILLIMORE, LORD CARSON, and LORD DARLING.

warrant could not be removed into the Court by certiorari, since the act of the Secretary-Treasurer was purely ministerial.

Upon appeal to the Supreme Court of Canada the judgment of the Appellate Division was reversed by a majority (Idington, Duff and Brodeur JJ.; Anglin and Mignault JJ. dissenting). The appeal is reported at [1923] S. C. R. 539.

The facts and the relevant provisions of the Act appear from the judgment of the Judicial Committee.

Upon the appeal coming on for argument on May 16, 1924, the hearing was adjourned in order that affidavits might be obtained as to the facts connected with the assessment of the tax and the signing of the warrant.

1924. July 2. *Sir John Simon K.C.*, *Carleton Allen K.C.* and *Hon. Geoffrey Lawrence* for the appellants. The evidence now obtained shows that the appellant did not in this case, nor according to the usual practice, make the assessment, but merely signed the distress warrant; his functions were purely ministerial. If there was any judicial act it was that of the Attorney-General who made the assessment. The Act itself and the regulations indicate that the duty of the Secretary-Treasurer is simply to issue a warrant or to take proceedings. It is well established that certiorari will not lie where an act is merely ministerial. [Reference was made to Short & Mellor's Practice of the Crown Office, 2nd ed., p. 42; *Rex* v. *Woodhouse* (1), reversed by the House of Lords, but upon a different point, sub nom. *Leeds Corporation* v. *Ryder* (2); *Ex parte Taunton* (3); *Rex* v. *Local Government Board for Ireland.* (4)]

The respondents did not appear.

July 23. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The first question that arises on this appeal is whether the Supreme Court of Canada were right in holding that an order could be made for the issue of a writ of certiorari to remove into the Supreme Court of New

(1) [1906] 2 K. B. 501.
(2) [1907] A. C. 420.
(3) (1831) 1 Dowl. P. C. 54.
(4) [1902] 2 I. R. 349.

J. C. 1924 HETHERINGTON v. SECURITY EXPORT CO.

Brunswick a distress warrant issued by the appellant under s. 6 of the New Brunswick Liquor Exporters Taxation Act. The Supreme Court of New Brunswick, Appellate Division, decided that such a writ could not issue, and by a majority of three judges to two that judgment was reversed by the Supreme Court of Canada.

In all the judgments there has been a very full and exact consideration of the different authorities and principles of law that regulate the issue of a writ of certiorari, and with the general principles that are there enunciated their Lordships see no reason to differ for, in their opinion, the real questions for determination here are: (1.) The true meaning of the statute under which the warrant was issued; and (2.) the question of fact as to what was actually done.

The statute in question provided by s. 3 that every person keeping liquor for export to any place outside the Province, or selling liquor for that purpose, should pay to the Crown a tax of $1.25 cents for each gallon of liquor other than beer, ale, stout and wines. Sect. 4 provides that the tax imposed by the Act in respect of liquor kept at the time of the passing of the Act should be paid within one month from the date on which the Act came into force, and on all subsequently acquired liquor within fifteen days from the date when it was so acquired, payment in each case to be made to the Provincial Secretary-Treasurer. Sect. 6 provides that in default of payment within the time limit the amount of tax might be levied under the warrant signed by the Provincial Secretary-Treasurer and directed to the sheriff of the county; and s. 7 enabled the Provincial Secretary-Treasurer, if he thought fit, instead of issuing the warrant, to take steps by action in any Court of competent jurisdiction to recover the tax. Except for the purpose of receiving the tax, of issuing the warrant, and of determining whether to recover by distress or action the Provincial Secretary-Treasurer had no duties whatever expressly imposed upon him by the statute. There is nothing in the Act that directly shows by whom the amount of the tax is to be assessed, nor the

procedure that should be adopted for its demand, but by s. 9 the Lieutenant-Governor in Council was empowered to make regulations for, among other things, "the fixing and determining the amount of the tax"; such regulations to have the same effect as if they had been incorporated in the statute. The statute appeared however to contemplate that the Attorney-General for the Province should be instrumental in the working of the Act for, by s. 8, it was provided that information should be given to the Attorney-General of the premises where the liquor was stored with a statement as to the kinds and brands of liquor, the amount and quantity, and such further particulars as the Attorney-General might require for the purposes of the Act, and it is difficult to see what those purposes were unless they included the ascertainment and assessment of the tax. It is noticeable that no such information was to be given to the Provincial Secretary-Treasurer.

Consequent upon the Act the Lieutenant-Governor issued regulations, the first two paragraphs of which are as follows: "(1.) Upon the recommendation of the Attorney-General, an officer shall be appointed to be designated and called as hereinafter mentioned, and also such assistant or assistants deemed necessary for carrying out of the provisions of the said Act and the regulations hereby made thereunder; the salaries of the said inspector and assistants, and the necessary expenses of the administration of the said Act and the carrying out of the regulations hereby made thereunder shall be paid out of the revenues of the Province. (2.) The officer so appointed under the preceding section, unless otherwise provided and designated under these regulations, as Liquor Carrying Inspector, shall be called the Liquor Export Inspector."

The Attorney-General did in fact appoint one Thos. J. Finigan as the liquor export inspector, and his appointment was duly approved. Finigan reported to the Attorney-General that the respondent company, at the time of the passing of the Act, had in their possession 49,642 gallons of liquor which were subject to tax of $1.25 cents. The amount

J. C. 1924 HETHERINGTON v. SECURITY EXPORT CO.

of the tax payable was upon this information fixed and determined by the Attorney-General, who demanded payment. The respondents however refused to pay on the ground that the statute was ultra vires, and thereupon the Attorney-General decided that a distress warrant should be issued under s. 6 of the statute. He accordingly made out a distress warrant for the amount, dated August 10, 1922, and placed it before the Provincial Secretary-Treasurer for signature, who signed and delivered it to the sheriff to be executed. It is this warrant in respect of which it is sought to obtain issue of a writ of certiorari in order that it may be brought up to be quashed upon the grounds already stated. The guiding principle regulating the issue of such a writ is not in serious controversy. It is well established that, if the issue of a distress warrant involves a judicial act, it is subject to the procedure by which an excessive exercise of jurisdiction can be brought up and challenged. If, on the other hand, it is a mere ministerial act following on the exercise of powers possessed by other people, then the writ of certiorari is not the proper remedy to apply.

In the present case the Court has thought that the Provincial Secretary-Treasurer was in fact entrusted by the statute with the duty of inquiring into the precedent facts. In the words of Duff J. (1): "The statute cannot contemplate the issue of the warrant without enquiry of the Secretary-Treasurer into the facts; an enquiry which, though not judicial in the sense that his decision is binding, is judicial in the sense that it aims at ascertaining the facts with a view to a possible proceeding in the nature of an execution, the issue of which execution rests in his discretion." Again Brodeur J., who agreed with Duff J., says: "Before issuing this distress warrant the Secretary-Treasurer had to satisfy himself that the appellant company had in its possession a certain quantity of liquor, that it had property rights in the liquor kept, that it was liable for the tax claimed, that there had been a demand for payment and default on the part of the debtor and that the law which he had as a minister of

(1) [1923] S. C. R. 557, 565.

the Crown to carry out was within the competency of the Legislature."

If their Lordships thought that the inferences contained in these extracts were well founded they would agree with the conclusions of law which follow therefrom. They are, however, unable to take this view, as in the course of the hearing, finding that the information was imperfect on the relevant points, they adjourned the hearing in order that further evidence of fact might be obtained, and from this evidence it appears clear that, in point of fact, as already stated, all the ascertainment and inquiry was done by the Attorney-General, and with it the Provincial Secretary-Treasurer had no concern. The question, therefore, is whether the Attorney-General's action was authorized by the statute, for, if it was not, the mere fact that he assumed the jurisdiction he did not possess could not assist the argument. Their Lordships think that the statute and the regulations did in fact confer this authority upon the Attorney-General. As already pointed out, there are no duties whatever cast upon the Provincial Secretary-Treasurer except the receipt of moneys and the exercise of the machinery necessary to secure their payment. The information required for the assessment of the tax is, by the statute, to be given to the Attorney-General alone. The regulations which were expressly issued for the purpose of fixing and determining the amount of the tax places in the hands of the Attorney-General the power of appointing the necessary officer for the purpose and, although neither the regulations nor the statute are plain, the true inference to be drawn from them is, in their Lordships' opinion, this, that the duty of fixing and determining the amount and requesting process for its recovery rests solely with the Attorney-General, and the Provincial Secretary-Treasurer possesses only the power of saying whether such sum should be recovered by warrant or by proceedings in the Courts. The fact that in such a case he determines to proceed by warrant does not render its issue a judicial act, and for these reasons their Lordships think that a writ of certiorari cannot be issued for the purpose of quashing a warrant so issued.

J. C. 1924 HETHERINGTON v. SECURITY EXPORT CO.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the judgment of the Supreme Court of Canada set aside and the judgment of the Supreme Court of New Brunswick (Appellate Division) restored with costs in the Courts below. The respondents will pay the costs of the appeal.

Solicitors for appellant: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.* 1924 July 28.

MONTREAL TRAMWAYS COMPANY . APPELLANTS;

AND

VILLE DE MONTRÉAL-NORD . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH OF QUEBEC (APPEAL SIDE).

Canada—Quebec—Power of Public Utility Commission—R. S. Queb., 1909, *arts.* 718, 742—10 *Geo.* 5 (*Queb.*), *c.* 21.

The Quebec Public Utility Commission has not jurisdiction under R. S. Queb., 1909, arts. 718, 742, as amended by 10 Geo. 5, c. 21, to make an ordinance allowing a new public street to be carried across the tramway tracks of the appellant company. The Commission has no power to create a servitude, or any other right, in the property of a "public utility."

Canada & Gulf Terminal Ry. Co. v. *Fleet* (1918) 28 Q. R. (K. B.) 112 disapproved.

Judgment of the Court of King's Bench reversed.

APPEAL (No. 35 of 1923) from a judgment of the Court of King's Bench for the Province of Quebec, Appeal Side (December 29, 1922), affirming a decision of the Quebec Public Service Commission.

The questions raised by the appeal were: (1.) Whether the Quebec Public Service Commission had jurisdiction to deal with a petition by the respondent Ville for permission

* *Present:* VISCOUNT CAVE, LORD DUNEDIN, LORD CARSON, LORD BLANESBURGH, and MR. JUSTICE DUFF.

to extend one of its streets across the tram lines of the appellant company; and (2.) if so, whether the Ville could be granted that right without the payment of compensation.

The facts appear from the judgment of the Judicial Committee.

1924. June 30. *Taschereau K.C.* for the appellants.

J. E. Beaulieu K.C. and *T. Mathew* for the respondents.

[Reference was made to arts. 718 (*a*) (*b*), 740 (*a*) (*e*), 742 and 743 of 10 Geo. 5 (Queb.), c. 21. The respondents referred to *Canada & Gulf Terminal Ry. Co.* v. *Fleet* (1), *Sydney Municipal Council* v. *Young* (2), and certain decisions of the Railway Commission of Canada.]

July 28. The judgment of their Lordships was delivered by

LORD DUNEDIN. In the town of Montréal-Nord there is a tramway which goes through the town. It is constructed on a strip of land which belongs in property to the Company. There is a street called the Avenue des Récollets, which abuts on the tramway from the north, and so forms a cul-de-sac. The town having expanded to the south, there is another street also called Avenue des Récollets, which has been constructed opposite to the first, and also forms a cul-de-sac. The town wished to connect the two streets by a level crossing across the tramway lines and so abolish the cul-de-sac and make the Avenues des Récollets an end to end street. In order to do so the respondents, the town of Montréal-Nord, presented a petition to the Quebec Service Commission.

The petition is headed: "Requête pour obtenir l'autorisation de prolonger l'Avenue des Récollets."

The petition, after setting forth the position of the tramway and the necessity for opening and prolonging certain streets, continues as follows: "A ces causes, la Ville de Montréal-Nord vous prie de donner un Ordre pour qu'elle puisse prolonger la dite Avenue des Récollets, en traversant sur son parcours et à niveau la voie ferrée en question; le tout, à telles conditions qu'il plaira à votre Commission."

(1) 28 Q. R. (K. B.) 112. (2) [1898] A. C. 457.

J. C.
1924
MONTREAL TRAMWAYS CO. v. MONTRÉAL-NORD (VILLE DE).

To this petition the respondents put in answers, para. 4 of which is as follows : " 4.—La requérante ne peut s'emparer de ce terrain sans l'avoir au préalable exproprié et en avoir payé la valeur et cette Commission n'a pas juridiction pour déposséder l'intimée en faveur de la requérante."

The Commission delivered a judgment in which, after narrating the demand of the town and the answers made by the tramway company, they said that they considered that as long as the title of the ground in question was not in any way taken away from the company the company had nothing to complain of, as the opening of the street would be apt to bring additional traffic to the railway, and they framed an ordinance allowing the passage on the railway to be made with crossing gates and signals, all to be erected at the expense of the town. At the end of the ordinance was the following paragraph : " Cette ordonnance est rendue uniquement pour réglementer la traverse des rails et du terrain de la compagnie par la Ville tant que durera l'exploitation de cette ligne de tramways et elle ne devra pas être interprétée comme affectant ou diminuant en aucune façon les droits de la Montreal Tramways Company à la propriété du terrain en question."

The appellants appealed to the King's Bench to reverse this decision. The decision was affirmed by a majority, two judges dissenting. An appeal has now been taken to His Majesty in Council.

The learned counsel for the respondents, in argument before their Lordships, attempted to take up the position that the ordinance as it stood was not really an authorization to the town to make the crossing, but only a regulation that if they could make it they should do it in a certain way. This view their Lordships think is quite untenable. It is directly opposed to the terms of the respondents' own petition and equally opposed to the grounds of the judgment of the Court below. The question, therefore, simply is whether the Commission could grant the authorization asked.

The Commission is appointed in virtue of an Act entitled the Quebec Public Utilities Commission Act. It is quite

unnecessary to cite at length the provisions of the Act. It is sufficient simply to point out that the Commission has no power of expropriation. Such powers are possessed by the town to a limited extent under other statutes, but it is not maintained that these powers have been exercised on this occasion. There being thus no right in the Commission to expropriate, the section to which finally the power to pronounce the order was referred was art. 742. That section is as follows: "The Commission shall have a general supervision over all public services subject to the legislative authority of the Province, as defined by article 718, and may make such orders regarding equipment, appliances, safety devices, extension of works or systems, reporting, and other matters, as are necessary for the safety or convenience of the public or for the proper carrying out of any contract, charter, or franchise involving the use of public property or rights."

By definition "public service" undoubtedly includes a tramway company. In their Lordships' view it is quite impossible to construe this section as giving some one, other than the public service in question, the right to impose a burden upon the public service's property. The section deals with what the public service may be ordered to do upon its own property. There is not the slightest doubt as to the effect of the present order. It is, as clearly explained by Guérin J., to create a servitude of passage. Now the whole scope of the section is not to provide for the creation of rights, but to regulate the conditions of an admitted possession. If the right of passage already existed either by grant, by statutory provision, or as a result of expropriation, then art. 742 would have its proper application, which cannot, in their Lordships' view, be stretched so as to create rights which do not otherwise exist. Art. 740 (*e*) shows what can be done in the case where a tramway company wishes to cross a street. There might well have been another section analogous to that, but it is not for the judiciary to legislate, and the counterpart of art. 740 (*e*) cannot be spelt out of art. 742.

J. C.
1924
MONTREAL TRAMWAYS CO. v. MONTRÉAL-NORD (VILLE DE).

Their Lordships were referred to *Canada & Gulf Terminal Ry. Co.* v. *Fleet* (1), where the Court, by a majority of three to two, held that art. 742 gave the Commission a right to grant another company running powers over a company's line. The learned judges of the majority thought that the words "other matters" introduced the necessary power. The dissenting judges held that "other matters" must be construed as ejusdem generis with the words preceding. In their Lordships' opinion the view of the minority was right, not alone upon the view as to ejusdem generis, but, as explained above, on the whole scope of the section. The view of the majority would lead to any possible length, without any definite limitation being suggested.

Their Lordships will, therefore, humbly advise His Majesty to allow the appeal, to dismiss the petition, the appellants to have their costs before this Board and in the Courts below.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Charles Russell & Co.*

(1) 28 Q. R. (K. B.) 112.

[PRIVY COUNCIL.]

CARON . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

J. C.*
1924
Aug. 1.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power—Dominion Taxation—Income Tax—Salary of Minister of Provincial Government—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *s.* 91, *sub-s.* 3; *s.* 92, *sub-ss.* 2, 4—*Income War Tax Act*, 1917 (7 & 8 *Geo.* 5, *c.* 28, *Dom.*), *ss.* 3, 4—*Income War Tax Amendment Act*, 1919 (9 & 10 *Geo.* 5, *c.* 55, *Dom.*), *s.* 2, *sub-s.* 1.

The Parliament of Canada had power under s. 91, head 3, of the British North America Act, 1867, to enact the Income War Tax Act, 1917, and the amending Act of 1919, whereby every person residing, or ordinarily residing, or carrying on business in Canada is rendered liable to pay income tax; and a minister of the Government of a Province is liable under the Acts in respect of the salary and sessional indemnity payable to him under statutes of the Province.

Abbott v. *City of St. John* (1908) 40 Can. S. C. R. 597 approved.

Judgment of the Supreme Court affirmed.

APPEAL (No. 75 of 1922) by special leave from a judgment of the Supreme Court of Canada (May 17, 1922) affirming a judgment of the Exchequer Court.

The action giving rise to the appeal was brought by the Crown, on the information of the Attorney-General for Canada, to recover from the appellant the sum of Rs.210 as income tax due for the year 1917 under the Income War Tax Act, 1917 (7 & 8 Geo. 5, c. 28, Dom.), and amending Acts.

The question to be decided was whether the above Acts were ultra vires, either in their entirety, or so far as they purported to render the appellant liable to assessment for income tax in respect of the salary payable to him under art. 574 of R. S. Q., 1909, as Minister of Agriculture in the Government of the Province of Quebec, and the sessional indemnity payable to him under art. 154 as a member of the Legislative Assembly of Quebec.

The action was tried in the Exchequer Court by Audette J., who gave judgment for the Crown.

* *Present:* VISCOUNT CAVE, LORD PHILLIMORE, LORD BLANESBURGH, and SIR ADRIAN KNOX.

J. C. 1924 CARON v. THE KING.

An appeal to the Supreme Court of Canada was dismissed. The learned judges (Sir Louis Davies C.J., and Idington, Duff, Anglin, Brodeur and Mignault JJ.) considered that they were bound by the decision of that Court in *Abbott* v. *City of St. John*. (1)

1924. July 15. *Sir John Simon K.C.*, *St. Laurent K.C.* and *Hon. Geoffrey Lawrence* for the appellant. Under the British North America Act, 1867, the appellant was immune from Dominion taxation in respect of his salary and indemnity. Having regard to head 4 of s. 92 and, as to the indemnity, head 1 the matter was one of the "classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," and therefore expressly excluded from the power conferred by s. 91. [Reference was made to *Citizens' Insurance Co.* v. *Parsons* (2) and *Bank of Toronto* v. *Lambe*. (3)]

[*Clauson K.C.* referred to *Dow* v. *Black*. (4)]

The Supreme Court followed its decision in *Abbott* v. *City of St. John* (1), but that decision conflicted with a long line of authority in Canada, and was erroneous. It was based upon the judgment of the Board in *Webb* v. *Outrim* (5), which was not applicable having regard to the essential difference between the constitutions of Canada and Australia : see observation of Viscount Haldane in *Jones* v. *Commonwealth Court of Conciliation* (6); *Great West Saddlery Co.* v. *The King* (7); and 23 Law Quarterly Review, p. 373.

It is further submitted that having regard to s. 92, head 2, it is not competent to the Dominion Legislature under s. 91, head 3, to impose direct taxation in a Province.

Clauson K.C., *Newcombe K.C.* and *T. Mathew* for the respondent were not called upon.

Aug. 1. The judgment of their Lordships was delivered by

LORD PHILLIMORE. This is an appeal from a judgment of the Supreme Court of Canada affirming the judgment of

(1) 40 Can. S. C. R. 597.
(2) (1881) 7 App. Cas. 96, 108.
(3) (1887) 12 App. Cas. 575, 585.
(4) (1875) L. R. 6 P. C. 272, 282.
(5) [1907] A. C. 81.
(6) [1917] A. C. 528, 531.
(7) [1921] 2 A. C. 91.

Audette J. in the Exchequer Court upon an information filed by the Attorney-General of Canada on behalf of H.M. The King, whereby the appellant Caron was ordered to pay the sum of $210 with interest and costs.

There is no dispute of fact in the case ; and the sole point to be determined is whether the appellant was rightly assessed and taxed under the Dominion Income War Tax Act, 1917, and the amending Dominion statute of 1919, in respect of his salary of $6000 a year as Minister of Agriculture in the Government of the Province of Quebec and sessional indemnity of $1600 as a member of the Legislative Assembly of the Province, as being his income or part of his income.

It was admitted for the purposes of the action that the Minister of Finance determined pursuant to the requirements of the Acts that the amount payable for tax by the appellant was the sum of $210, and duly notified the appellant that this amount was payable by him, and that in so determining the Minister took into account the appellant's salary as Minister of Agriculture.

It was contended on behalf of the appellant that he was notwithstanding not liable to pay this sum (1.) because it was ultra vires of the Parliament of Canada to pass the Income War Tax Acts and (2.) because in any event he was not liable to taxation in respect of his salary as Provincial Minister or his sessional indemnity.

The important provisions of the Income War Tax Act, 1917, are ss. 3 and 4 : By s. 3 : (1.) " For the purposes of this Act, ' income ' means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession, or calling." Then follow certain exemptions and deductions not material. By s. 4 : (1.) " There shall be assessed, levied and paid, upon the income during the preceding year of every person residing or ordinarily resident in Canada or carrying on any

J. C. 1924 CARON v. THE KING.

business in Canada, the following taxes :—" And then follow the varying rates according to the amount of the income.

The statute of 1919 (9 & 10 Geo. 5, c. 55) amending the Income War Tax Act, 1917, provided as follows : Sect. 2 : (1.) " Sub-section one of section three of the said Act (the Income War Tax Act, 1917) is amended by inserting . . . . and after the word ' contract ' in the twenty-second (i.e., the last) line thereof the following : ' and including the salaries, indemnities or other remuneration of members of the Senate and House of Commons of Canada and officers thereof, members of Provincial Legislative Councils and Assemblies and Municipal Councils, Commissions or Boards of Management, any Judge of any Dominion or Provincial Court appointed after the passing of this Act, and of all persons whatsoever whether the said salaries, indemnities or other remuneration are paid out of the revenues of His Majesty in respect of His Government of Canada, or of any Province thereof, or by any person, except as provided in section five of this Act.' "

Both the points now raised by the appellant were fully dealt with in the judgment of Audette J. When the case came before the Supreme Court of Canada the judgment was concise, the Chief Justice on behalf of the Court stating that he thought that the case was settled by the previous decision of the Court in *Abbott* v. *City of St. John* (1), in which case an official of the Dominion Government had been assessed on his income as such official, and it had been held that the Provinces had the right to impose income taxes upon Dominion officials resident within them in respect of their official salaries. The Court thought that the present case was the converse of *Abbott's Case* (1) and was governed by the same reasons.

The whole matter turns on the construction and application of ss. 91 and 92 of the British North America Act of 1867, and their Lordships in determining it are assisted and guided by the mass of decisions on these two sections which have been previously given by the Board.

(1) 40 Can. S. C. R. 597.

By s. 91 of the Act it is provided that: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say: . . . . (3.) The raising of money by any mode or system of taxation. . . . . And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Money raised by an income tax Act is unquestionably money raised by a mode or system of taxation.

It is true that by the provisions of s. 92 the Legislature in each Province may exclusively make laws in relation to certain matters coming within the classes of subjects which are there enumerated, and that one of these classes of subjects is "direct taxation within the Province in order to the raising of a revenue for provincial purposes."

As such particular direct taxation is reserved to the Province, to that extent there is some deduction to be made from the totality of power apparently given exclusively to the Dominion Parliament to raise money for any purpose by any mode or system of taxation.

This apparent antinomy has been noticed in various decisions. It is sufficient to mention *Citizens' Insurance Co.* v. *Parsons* (1) and the *Bank of Toronto* v. *Lambe.* (2) In the latter case, their Lordships observed as follows: "It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at

(1) 7 App. Cas. 96. (2) 12 App. Cas. 575.

J. C. 1924 CARON v. THE KING.

the same time to give to the provincial Legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two sections was noticed by way of illustration in the case of *Parsons*": and after quoting from the earlier judgment, their Lordships proceeded: "Their Lordships adhere to that view, and hold that, as regards direct taxation within the Province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial Legislatures."

Both sections of the Act of Parliament must be construed together; and it matters not whether the principle to be applied is that the particular provision in head 2 of s. 92 effects a deduction from the general provision in head 3 of s. 91, or whether the principle be that head 3 of s. 91 is confined to Dominion taxes for Dominion purposes.

The only occasion on which it could be necessary to consider which of these two principles was to guide, would be in the not very probable event of the Parliament of Canada desiring to raise money for provincial purposes by indirect taxation. It might then become necessary to consider whether the taxation could be supported, because the power to impose it, given by head 3 of s. 91, had not been taken out of the general power by the particular provision, or because though not given by head 3, it was given as a residual power by the other parts of s. 91. But no such question arises now.

Upon any view there is nothing in s. 92 to take away the power to impose any taxation for Dominion purposes which is prima facie given by head 3 of s. 91. It is not therefore ultra vires on the part of the Parliament of Canada to impose a Dominion income tax for Dominion purposes; and the first point must therefore be decided against the appellant.

Then as to the second point, certain incomes such as those of the Governor-General of Canada and Consuls and Consuls-General are exempted from taxation by the Acts in question; and if there were foreign ministers resident in Canada, it would no doubt be proper that, in accordance with international law, their incomes should either be expressly exempted or impliedly held exempt from taxation. But their

Lordships can see no reason in principle why any of the sources of income of a taxable citizen should be removed from the power of taxation given to the Parliament of Canada.

It may be doubted whether it was necessary to amend the original Act in order to bring the various officers mentioned in s. 2 of the Act of 1919 within the scope of the Act of 1917. But assuming that this amending legislation was necessary, it is not to be regarded as in the nature of specific legislation directed against certain public officers, but merely as declaratory that certain classes of income are, as they certainly would be in this country, liable to taxation and not exempt.

Various extreme cases were suggested by counsel in argument.

Objections of this class, however, were well met by Davies J. when giving the leading judgment in the case of *Abbott* v. *City of St. John*. (1) He was dealing with the imposition of tax by the Province upon a Dominion official, which imposition, it was contended, contravened the provisions of head 8 of s. 91, a provision which gives to the Dominion "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada." He said: "The Province does not attempt to interfere directly with the exercise of the Dominion power, but merely says that, when exercised, the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents. . . . . It is said," he continued, "the Legislature might authorize an income tax denuding a Dominion official of a tenth or even a fifth of his official income, and, in this way, paralyse the Dominion service and impair the efficiency of the service. But it must be borne in mind that the law does not provide for a special tax on Dominion officials but for a general undiscriminatory tax upon the incomes of residents and that Dominion officials could only be taxed upon their incomes in the same ratio and proportion as other residents. At any rate, if, under the guise of exercising power of taxation, confiscation of a

(1) 40 Can. S. C. R. 597, 606, 607.

J. C. 1924 CARON v. THE KING.

substantial part of official and other salaries were attempted, it would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power."

In *Great West Saddlery Co.* v. *The King* (1) provincial legislation, which had the effect of precluding Dominion trading companies from carrying on their business in the Province unless they complied with certain special terms, was held ultra vires, as calculated to abrogate the capacity or derogate from the status which it was in the power of the Parliament of Canada to bestow; and a general principle was laid down that no provincial Legislature could use its special powers as an indirect means of destroying powers given by the Parliament of Canada.

By parity of reason the Parliament of Canada could not exercise its power of taxation so as to destroy the capacity of officials lawfully appointed by the Province.

But the Income Tax Acts, notwithstanding the special language of the second Act, are not discriminating statutes. They are statutes for imposing on all citizens contributions according to their annual means, regardless of, or it may be said not having regard to, the source from which their annual means are derived.

For these reasons and for those given by the learned judges of the majority in *Abbott* v. *City of St. John* (2), to which their Lordships desire to express their assent, their Lordships will humbly recommend His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

(1) [1921] 2 A. C. 91. (2) 49 Can. S. C. R. 597, 606, 607.

[PRIVY COUNCIL.]

MARIE TILCHE SASSON . . . . . APPELLANT; J. C.* 1924 July 30.

AND

MAURICE SASSON . . . . . RESPONDENT.

ON APPEAL FROM HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT.

Egypt—Divorce—Jurisdiction—British Subjects of Jewish Religion—Divorce by Rabbi—Declaratory Decree by British Court—Ottoman Order in Council, 1910, *arts.* 90, 103.

The respondent and his wife, the appellant, who were British subjects of the Jewish religion and resident in Egypt, were divorced by the Grand Rabbinat at Alexandria in accordance with the Jewish religion, but upon grounds which would not have supported a decree for divorce according to English law. The appellant brought an action against the respondent in the Supreme Court for Egypt for a declaration that the divorce was effectual to dissolve the marriage.

The Order in Council of 1910, by which civil jurisdiction over British subjects was conferred, provided by art. 90 that "in all matters relating to marriage, inheritance, or other questions involving religious law or custom the Court shall, in the case of persons belonging to non-Christian communities, recognize and apply the religious law or custom of the persons concerned." Art. 103 conferred "all such jurisdiction in matrimonial causes, except the jurisdiction relative to dissolution or nullity or jactitation of marriage, as for the time being belongs to the High Court in England":—

Held, that the appellant was entitled to the declaratory decree which she sought.

Judgment of the Supreme Court reversed.

APPEAL (No. 50 of 1924) from a judgment of His Britannic Majesty's Supreme Court at Alexandria (February 7, 1924) dismissing an action by the appellant.

The action in question was brought by the appellant against the respondent, her husband, for a declaration that a decree of divorce between the parties pronounced by the Grand Rabbinat at Alexandria on May 6, 1920, was effectual and binding upon the parties, and for specific performance of an agreement.

The material facts appear from the judgment of the Judicial Committee.

* *Present:* VISCOUNT CAVE, LORD DUNEDIN, and LORD CARSON.

J. C. 1924 SASSON v. SASSON.

1924. June 20. *Sir E. Hume Williams K.C.* and *S. Hyams* for the appellant.

Cotes-Preedy and *V. O. Williams* for the respondent.

[Reference was made to the Ottoman Order in Council, 1910, arts. 5, 90 and 103; the Egypt Order in Council, 1915; and to the Egypt (Amendment) Order in Council, 1921, art. 7; also to the following: *Harvey* v. *Farnie* (1); *Pemberton* v. *Hughes* (2); *Bater* v. *Bater* (3); *Casdagli* v. *Casdagli* (4); *Ex parte Mir-Anwaruddin* (5); *Le Mesurier* v. *Le Mesurier* (6); *Mitford* v. *Mitford* (7); and Dicey's Conflict of Laws, 3rd ed., p. 440.]

Lord Dunedin referred to *Sarabai* v. *Rabiabai.* (8)

July 30. The judgment of their Lordships was delivered by

LORD DUNEDIN. The parties to this case, who are domiciled in Egypt, are Jews professing and practising the Jewish religion. They were married in Alexandria on June 5, 1905. On May 6, 1920, they were divorced by the Grand Rabbinat at Alexandria in accordance with Jewish law. Concurrently with the said divorce, and of even date, an agreement was entered into between them regulating the conditions as to the issue of the marriage and the sum to be paid to the divorced wife. The divorce, proceeding under Levitical law, proceeds on grounds which, according to English law, would not authorize divorce.

The present action, as amended, is brought by the wife to ask for a declaration that the divorce was effectual to dissolve the marriage, and to declare that the agreement in question is valid. The husband has appeared by counsel, who has offered no argument against the judgment desired being granted. The parties are British subjects, and, as such, subject to the jurisdiction of the Supreme Court of Alexandria.

At the time the Jewish divorce was granted what regulated the matters in question was the Order of 1910, which, by

(1) (1882) 8 App. Cas. 43.
(2) [1899] 1 Ch. 781.
(3) [1906] P. 209.
(4) [1919] A. C. 145.
(5) [1917] 1 K. B. 634.
(6) [1895] A. C. 517.
(7) [1923] P. 130.
(8) (1905) I. L. R. 30 Bom. 537.

art. 5, s. 2, gives jurisdiction to the Court as to all personal and proprietary rights of British subjects, but in art. 103 it was provided: "The Supreme Court shall, as far as circumstances admit, have for and within the Ottoman dominions, with respect to British subjects, all such jurisdiction in matrimonial causes, except the jurisdiction relative to dissolution or nullity or jactitation of marriage, as for the time being belongs to the High Court in England."

Article 90 was as follows: "Subject to the provisions of this Order, the civil jurisdiction of every Court acting under this Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, English law for the time being in force. Provided that in all matters relating to marriage, inheritance or other questions involving religious law or custom, the Court shall, in the case of persons belonging to non-Christian communities, recognise and apply the religious law or custom of the person concerned."

The situation, therefore, was this. The Court had no jurisdiction itself to dissolve a marriage. It had, however, jurisdiction to declare rights and, in matters relating to marriage (which obviously include divorce), it was bound in the case of persons not belonging to Christian communities to recognize and apply the religious law and custom of the persons concerned. It is not necessary to cite the various cases in which the power of Courts to divorce a vinculo has been discussed. The case of *Le Mesurier* v. *Le Mesurier* (1) finally settled that the proper and only Court is the Court of the domicil. Now the Court of the domicil here could not grant divorce, but on the other hand it was bound by the words above cited to acknowledge the validity of a divorce good according to the religious law of the non-Christian subject. The situation seems to their Lordships identical with that which has often arisen in India. Divorce by means of the use of the phrase known as "talak" is not a ground which would be good by English law. None the less, the British Courts have often given effect to Mahomedan divorces, and an instance may be found in the case of

(1) [1895] A. C. 517.

J. C. 1924 SASSON v. SASSON.

Sarabai v. *Rabiabai*. (1) Their Lordships are, therefore, of opinion that the appellant is entitled to the declaration as to the divorce which she seeks. The declaration as to the validity of the agreement following is a corollary, and affords in their view a justification for her appeal to the English Court.

Their Lordships must, however, make it clear that this judgment will not cover the situation which might arise in the future. At the time of this divorce the Rabbinat Court was the only Court to which the parties could apply. Now, by an Order of 1921, the words of exception under art. 103 of the Order of 1910 are repealed, and the Court has the same jurisdiction as the High Court in England. Their Lordships indicate no opinion as to what will be in the future the result of the situation so created.

Their Lordships will humbly advise His Majesty to reverse the judgment complained of with costs and to remit the case to the Supreme Court of Alexandria with instructions to grant the declaration as above indicated.

The respondent will pay the costs of the appeal.

Solicitors for appellant: *Gisborne, Woodhouse & Co.*
Solicitors for respondent: *Lattey & Hart.*

(1) I. L. R. 30 Bom. 537.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR ONTARIO . APPELLANT;

AND

DALY (SINCE DECEASED) AND OTHERS . . RESPONDENTS.

J. C.*
1924
July 14.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Mandamus—Jurisdiction of Supreme Court of Ontario—Criminal Matter—Absence of Rules—Special Leave to appeal—Criminal Code (R. S. Can., 1906, c. 146), ss. 827, 1025.

The Supreme Court of Ontario has jurisdiction to mandamus a County Court Judges Criminal Court to try, according to the procedure provided by s. 827 of the Criminal Code of Canada, a person against whom an indictment has been found by a grand jury for the county. The fact that no rules have been made as to the issue of a mandamus in a criminal matter does not preclude the Supreme Court from exercising its full powers.

Special leave to appeal to the Privy Council was granted upon a petition alleging two grounds: (1.) that the Supreme Court had not jurisdiction to issue a mandamus in the circumstances above referred to, and (2.) that under the Criminal Code the persons indicted had not the option given by s. 827 to be tried without a jury. Special leave was granted on the first ground; the question whether the appeal could be entertained was reserved:—

Held, that the appeal should be dismissed, since the ground upon which special leave was given failed, and the second ground was merely a question of procedure and was not one upon which an appeal would be entertained.

The validity and effect of s. 1025 of the Criminal Code, which purports to preclude any appeal to the Privy Council in a criminal matter, were not considered.

Judgment of the Appellate Division affirmed.

APPEAL (No. 38 of 1924) by special leave from a judgment of the Supreme Court of Ontario, Appellate Division (January 31, 1924), affirming, with a variation, an order in the nature of a mandamus made by Middleton J. in chambers (December 20, 1923).

The facts relevant to the appeal appear from the judgment of the Judicial Committee.

* *Present:* VISCOUNT CAVE, LORD DUNEDIN, LORD CARSON, LORD BLANESBURGH, and LORD DARLING.

J. C.
1924
ATTORNEY-GENERAL FOR ONTARIO
v.
DALY.

The judgments delivered by the learned judges of the Appellate Division, who, by a majority, affirmed the order of Middleton J., subject to a variation, appear from a report at 55 Ont. L. R. 156.

1924. July 3, 4. *D. L. McCarthy K.C.*, *McGregor Young K.C.* and *Hon. Geoffrey Lawrence* for the appellant. An accused person against whom an indictment has been found by a grand jury has not the option given by s. 827 of the Criminal Code to be tried without a jury; the procedure provided by Part XVIII. of the Code has no application to procedure by indictment under Part XIX. The decision in *Rex* v. *Sovereen* (1) was binding upon the Appellate Division, and was not overruled by that in *Rex* v. *Giroux*. (2) Further, the power of the Supreme Court to issue mandamus does not apply to a criminal matter, the judges of the Supreme Court having passed no rules relative thereto.

Rowell K.C., *Tilley K.C.* and *C. F. H. Carson* for the respondent. Leave to appeal was granted solely having regard to the question of jurisdiction. It is clear that the Supreme Court has by statute all the powers which formerly belonged to the Courts of Queen's Bench and Common Pleas of Upper Canada, which included a power to mandamus an inferior Court. [Reference was made to Consolidated Stat. of U.C. 1859, c. 10; British North America Act, 1867, s. 91, sub-s. 27, s. 92, sub-s. 14, s. 129; Stat. of Ont., 1881, c. 5, s. 3; Stat. of Can., 1883, c. 10; 9 Edw. 7 (Ont.), c. 28, s. 10; 3 & 4 Geo. 5 (Dom.), c. 50, s. 2; Criminal Code (R. S. C. 1906, c. 146), ss. 10, 576, 599; *In re North York Election Case* (3), reversed by *Mitchell* v. *Cameron* (4); see also *In re McKenzie*. (5)] The fact that no rules applicable have been passed does not preclude the Court from exercising its statutory powers. The question with regard to the right of an indicted person to avail himself of the option given by s. 827 of the Criminal Code is merely a question of procedure,

(1) (1912) 26 Ont. L. R. 16.
(2) (1917) 56 Can. S. C. R. 63.
(3) (1882) 32 U. C. C. P. 458.
(4) (1883) 8 Can. S. C. R. 126.
(5) (1871) 31 U. C. Q. B. 1.

and it was raised in opposition to the indicted persons. Having regard to the practice of the Board in criminal matters, as laid down in *In re Dillet* (1), and numerous other decisions, the question obviously is not one upon which special leave to appeal could be based. Special leave was granted subject to argument as to whether the appeal should be entertained. If therefore the appeal fails on the point as to jurisdiction it should not be entertained on the further point.

[Sect. 1025 of the Criminal Code was mentioned, but there was no argument as to its validity.]

Giveen for the Crown and *H. J. Scott K.C.* for the Minister of Justice for Canada watched the proceedings.

July 14. The judgment of their Lordships was delivered by

VISCOUNT CAVE. In this case the Attorney-General for Ontario appeals by special leave from an order of the Appellate Division of the Supreme Court of Ontario affirming (with a variation) an order made by Middleton J. in chambers. The learned judge by his order directed that the County Court Judges Criminal Court of the County of York and the judge of that Court should take the proceedings required to be taken under s. 827 of the Criminal Code of Canada and should try the respondents Daly and others on the charges set out in certain indictments found against them by the grand jury at the assizes for that County; and this order was affirmed by the Appellate Division with the addition of a proviso saving the right of the Attorney-General under s. 825, sub-s. 5, of the Criminal Code to require that one of those charges (which alleged an offence punishable by imprisonment for seven years) should be tried by a jury.

The petition of the Attorney-General for Ontario to His Majesty in Council upon which the special leave to appeal was granted was based upon two grounds—namely, first, that the Supreme Court had no power by mandamus to compel the judge of the County Court Judges Criminal Court to try the respondents on the charges in question and that the civil jurisdiction of the Court had been wrongly invoked

(1) (1887) 12 App. Cas. 459.

J. C.
1924
ATTORNEY-GENERAL FOR ONTARIO v. DALY.

in a criminal matter; and secondly, that on the true construction of Part XVIII. of the Criminal Code (which relates to speedy trials on indictable offences) the respondents, not having been sent to trial by a magistrate but having been charged only on indictments found by a grand jury, had no right to elect (as they had elected) to be tried by the judge of the County Court Judges Criminal Court without a jury instead of being tried at the assizes with a jury, and accordingly that in this case no mandamus should have been granted.

It is evident that the first of the two questions raised by the petition involved a consideration of the relation of the civil law and procedure of the Province of Ontario to the criminal law and procedure applicable throughout the Dominion of Canada, and that if this question arose in the case it was desirable that it should be considered and determined by the Board. On the other hand the second question raised by the petition, which related only to the construction and effect of certain sections of the Criminal Code, was more proper to be determined by the Canadian Courts; and as there was no question of a violation of the principles of natural justice or of the infliction of substantial injustice on an accused person, leave to appeal on this ground would, according to the settled practice of the Board, have been refused. Accordingly, in the arguments on the petition (which was heard ex parte) stress was laid on the former question; and it was on that ground (as clearly appears from the shorthand notes) that the Board advised His Majesty to grant special leave to appeal, a recommendation being added that the question whether in the circumstances of the case an appeal would lie should remain open for argument at the hearing. Leave was accordingly granted by His Majesty in Council on those terms.

Their Lordships have now been put in possession of all the circumstances of the case and have been informed of the arguments put before the Ontario Courts, and they are satisfied that in fact no serious question arises as to the jurisdiction of the Supreme Court to grant a mandamus in such a case

as this. That Court is clothed by statute with all the powers formerly belonging to the Courts of Queen's Bench and Common Pleas of Upper Canada, which clearly included a power (as in England) to issue an order of mandamus to an inferior Court; and although it appears that no rules regulating the method in which that power is to be exercised have yet been made, that circumstance does not, in their Lordships' view, prevent the Supreme Court from making full use of its powers. It follows that, in their Lordships' opinion, there is no doubt whatever as to the power of the Supreme Court to grant a mandamus, and no question of any irregular intrusion by a civil Court in a criminal matter; and accordingly the first and effective ground of appeal put forward in the petition of appeal wholly fails.

In these circumstances their Lordships have considered whether they should permit the appeal to proceed upon the second ground, and they have come to the conclusion that this should not be allowed. The leave to appeal was granted on the first ground only; and, that ground having proved to have no substance, the question reserved by the order giving leave to appeal, whether under the circumstances of the case an appeal should be entertained, arises for decision. In their Lordships' opinion this question should be answered in the negative. The sole question now remaining is one of procedure under the Criminal Code of Canada; and upon that question, which is peculiarly within the province of the judges who administer that law, their Lordships would not be disposed to entertain an appeal. They will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

As s. 1025 of the Criminal Code of Canada was mentioned in the course of the argument, their Lordships think it right to add that they have not considered the question of the validity or effect of that section.

Petitions have been presented by the respondents Daly and others, asking that the order giving leave to appeal be rescinded or that the variation made by the Appellate Division in the order of Middleton J. be struck out, and also

J. C.
1924
ATTORNEY-GENERAL FOR ONTARIO v. DALY.

for the admission of a supplemental record. A petition has also been presented by His Majesty's Attorney-General asking leave to intervene in the case. It appears to their Lordships that no order should be made on these petitions as to costs or otherwise, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*
Solicitors for Crown: *Treasury Solicitors.*
Solicitors for Minister of Justice: *Charles Russell & Co.*

END OF VOL. AND OF APPELLATE SERIES FOR 1924.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1924 will be as follows :—

In the First Series,
[1924] 1 Ch. [1924] 2 Ch.

In the Second Series,
[1924] 1 K. B. [1924] 2 K. B. [1924] P.

In the Third Series,
[1924] A. C.

INDEX.

ADULTERY—Child born in wedlock—Legitimacy—Evidence by husband of non-access - - - - - **687**
See DIVORCE.

AGRICULTURAL HOLDING—Notice to quit—Length of notice - **38**
See LANDLORD AND TENANT.

ALLOTMENT—Of shares and debentures before filing statement in lieu of prospectus - - - - - **958**
See COMPANY (WINDING UP).

ANCIENT LIGHTS—*Threatened Obstruction—Quia timet Action—Jurisdiction to award Damages in lieu of Injunction—Chancery Procedure Amendment Act*, 1858 (*Lord Cairns's Act*) (21 & 22 *Vict. c.* 27), *s.* 2—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 16—*Statute Law Revision and Civil Procedure Act*, 1883 (46 & 47 *Vict. c.* 49), *s.* 5—*Statute Law Revision Act*, 1898 (61 & 62 *Vict. c.* 22), *s.* 1.

Decision of the Court of Appeal [1923] 1 Ch. 431 reversed. LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LD. *v.* SLACK
H. L. (E.) 851

ARBITRATION—Enforcing award—Sovereign ruler—Submission to jurisdiction - - - - - - **797**
See FOREIGN STATE.

ARISING OUT OF EMPLOYMENT - **302**
See WORKMEN'S COMPENSATION.

ASSIGNMENT OF COPYRIGHT—In future works — Infringement — Right of assignee to sue without joining assignor - - - - - **1**
See COPYRIGHT.

AUSTRALIA.
See NEW SOUTH WALES, RESTRAINT OF TRADE, and SOUTH AUSTRALIA.

BAD STOWAGE - - - - **522**
See SHIPPING.

BARBADOS - - - - - - **783**
See COMPANY (WINDING UP).

BEQUEST—"For benefit of New South Wales returned soldiers" - **496**
See CHARITY.

BILL OF EXCHANGE—*Indorsement—Delivery to Drawer—Subsequent Indorsement by Drawer—Drawer's Right against Indorser—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 20, 29, 56.

Decision of the Court of Appeal reversed. MCDONALD (GERALD) & CO. *v.* NASH & CO.
H. L. (E.) 625

BILL OF LADING—Conditions—Damage to cargo - - - - - - **522**
See SHIPPING.

—— Exceptions—Unseaworthiness - **100**
See SHIPPING.

BONA VACANTIA—Royalties - - **213**
See CANADA.

BREACH—Of condition against over-insurance—Waiver - - - **431**
See INSURANCE (MARINE).

BRIDGE—Collapse—Repair - - **877**
See HIGHWAY.

BRITISH COLUMBIA.
See CANADA.

BRITISH MEDICAL ASSOCIATION—New South Wales Branch—Rules—Expulsion of member - - - **765**
See RESTRAINT OF TRADE.

BROKER—Indemnity - - - 566
See PRINCIPAL AND AGENT.

CANADA - - - - - - 196
See SPECIFIC PERFORMANCE.

2. —— *Bona vacantia* — "*Royalties*" — *British North America Act*, 1867 (30 & 31 *Vict. c.* 103), *ss.* 102, 109.

Judgment of the Supreme Court of Canada affirmed. REX *v.* ATT.-GEN. OF BRITISH COLUMBIA - - - - - **J. C. 213**

3. —— *Customs Duties—Importation of Liquor by Provincial Government—Property of Province—British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 91, *heads* 2, 3; *s.* 125.

Judgment of the Supreme Court of Canada affirmed. ATT.-GEN. OF BRITISH COLUMBIA *v.* ATT.-GEN. OF CANADA; ATT.-GEN. FOR ONTARIO INTERVENER **J. C. 222**

4. —— *Legislative Authority—Insurance—Criminal Law—Reciprocal Insurance Act*, 1922 (12 & 13 *Geo.* 5, *Ont., c.* 62)—*Criminal Code* (*R. S. Can.*, 1906), *s.* 508*c*—*Insurance Act* (7 & 8 *Geo.* 5, *c.* 29, *Dom.*), *ss.* 11, 12—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92.

Judgment of the Appellate Division varied. ATT.-GEN. FOR ONTARIO *v.* RECIPROCAL INSURERS - - - - - **J. C. 328**

5. —— *Legislative Power — Dominion Taxation—Income Tax—Salary of Minister of Provincial Government — British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 91, *sub-s.* 3; *s.* 92, *sub-ss.* 2, 4—*Income War Tax Act*, 1917 (7 & 8 *Geo.* 5, *c.* 28, *Dom.*), *ss.* 3, 4—*Income War Tax Amendment Act*, 1919 (9 & 10 *Geo.* 5, *c.* 55, *Dom.*), *s.* 2, *sub-s.* 1.

Judgment of the Supreme Court affirmed. CARON *v.* THE KING - - - **J. C. 999**

6. —— *Legislative Power of Province—Employment of Japanese — Conflict with Dominion Statute — Japanese Treaty Act*, 1913 (3 & 4 *Geo.* 5, *c.* 27, *Dom.*)—11 *Geo.* 5, *c.* 49, *B. C.*—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 132.

Judgment of the Supreme Court affirmed. ATT.-GEN. OF BRITISH COLUMBIA *v.* ATT.-GEN. OF CANADA - - **J. C. 203**

7. —— *Ontario — Mandamus — Jurisdiction of Supreme Court of Ontario—Criminal Matter—Absence of Rules—Special Leave to appeal—Criminal Code* (*R. S. Can.*, 1906, *c.* 146), *ss.* 827, 1025.

Judgment of the Appellate Division affirmed. ATT.-GEN. FOR ONTARIO *v.* DALY **J. C. 1011**

8. —— *Quebec — Municipal Valuation Roll — Action to set aside Roll — Supervising Control of Superior Court—Statutory Means of Relief—R. S. Q.*, 1909, *arts.* 5705, 5706, 5715 — *Code of Civil Procedure* (*Quebec*), *art.* 50.

Judgment of the Supreme Court affirmed. SHANNON REALTIES, LD. *v.* VILLE DE ST. MICHEL - - - - **J. C. 185**

CANADA—*continued.*

9. —— *Quebec—Power of Public Utility Commission—R. S. Queb.*, 1909, *arts.* 718, 742—10 *Geo.* 5 (*Queb.*), *c.* 21.

Judgment of the Court of King's Bench reversed. MONTREAL TRAMWAYS CO. *v.* VILLE DE MONTRÉAL-NORD - - **J. C. 994**

10. —— *Quebec — Will — Partition of Testator's Property — Intention of Testator — Construction of Will—Civil Code of Quebec, art.* 689.

Judgment of the Court of King's Bench reversed. LACOSTE *v.* DUCHESNAY **J. C. 166**

CASES:—

—— *A. B.* v. *C. B.* (1906) 8 F. 603.
Applied. *G. v. G.* **H. L. (Sc.) 349**

—— *Abbott* v. *City of St. John* (1908) 40 Can. S. C. R. 597.
Approved. CARON *v.* THE KING **J. C. 999**

—— *Alexander* v. *Kirkpatrick* (1874) L. R. 2 H. L. Sc. 397.
Applied. WARD *v.* VAN DER LOEFF. BURNYEAT *v.* VAN DER LOEFF **H. L. (E.) 653**

—— *Att.-Gen.* v. *Anderton* [1921] 1 K. B. 159.
Considered. LORD ADVOCATE *v.* MACALISTER - - **H. L. (Sc.) 586**

—— *Att.-Gen.* v. *Great Northern Ry. Co.* [1916] 2 A. C. 356.
Applied. ATT.-GEN. FOR IRELAND *v.* LAGAN NAVIGATION CO. **H. L. (Ir.) 877**

—— *Att.-Gen.* v. *Southport Corporation* [1923] 1 Ch. 548.
Affirmed - - - - **909**

—— *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada* [1916] 1 A. C. 588.
Followed. ATT.-GEN. FOR ONTARIO *v.* RECIPROCAL INSURERS **J. C. 328**

—— *Att.-Gen. for Ireland* v. *Lagan Navigation Co.* [1923] 1 I. R. 91.
Affirmed - - - - **877**

—— *Att.-Gen. of British Columbia* v. *Att.-Gen. of Canada* (1888) 14 App. Cas. 295.
Applied. REX *v.* ATT.-GEN. OF BRITISH COLUMBIA - **J. C. 213**

—— *Att.-Gen. of Ontario* v. *Mercer* (1883) 8 App. Cas. 767.
Applied. REX *v.* ATT.-GEN. OF BRITISH COLUMBIA - **J. C. 213**

—— *Baker* v. *Inland Revenue Commissioners* [1923] 1 K. B. 323.
Affirmed - - - - **270**

—— *Blair Open Hearth Furnace Co., In re* [1914] 1 Ch. 390, 399, 407.
Dicta of Warrington J. and Swinfen Eady L.J. in, discussed. OFFICIAL RECEIVER AND LIQUIDATOR OF JUBILEE COTTON MILLS *v.* LEWIS **H. L. (E.) 958**

CASES—*continued.*

—— *Board of Commerce Act, In re* [1922] 1 A. C. 191.
Followed. ATT.-GEN. FOR ONTARIO *v.* RECIPROCAL INSURERS **J. C. 328**

—— *Boggan* v. *Motor Insurance Co.* [1922] 2 I. R. 184, 189.
Dictum of Ronan L.J. in, disapproved. LONDON AND LANCASHIRE FIRE INSURANCE CO. *v.* BOLANDS **H. L. (Ir.) 836**

—— *Bohn* v. *Bogue* (1846) 10 Jur. 420.
Distinguished. PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - **H. L. (E.) 1**

—— *Bowden's (E. M.) Patents Syndicate* v. *Herbert Smith & Co.* [1904] 2 Ch. 86.
Approved. PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - **H. L. (E.) 1**

—— *Brabant* v. *King* [1895] A. C. 632.
Followed. WELDEN *v.* SMITH **J. C. 484**

—— *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.* [1905] A. C. 454, 462.
Dictum of Lord Macnaghten in, explained and distinguished. PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - - - - - **H. L. (E.) 1**

—— *Burnyeat, In re* [1923] 2 Ch. 52.
Reversed sub nom. WARD *v.* VAN DER LOEFF. BURNYEAT *v.* VAN DER LOEFF - - - - - **653**

—— *Bywell Castle, The* (1879) 4 P. D. 219.
Applied. UNITED STATES SHIPPING BOARD *v.* LAIRD LINE, LD. **H. L. (Sc.) 286**

—— *Canada and Gulf Terminal Ry. Co.* v. *Fleet* (1918) 28 Q. R. (K. B.) 112.
Disapproved. MONTREAL TRAMWAYS CO. *v.* VILLE DE MONTRÉAL-NORD - - - - - **J. C. 994**

—— *Cantiare San Rocco, S. A.* v. *Clyde Shipbuilding and Engineering Co.* 1922 S. C. 723.
Reversed - - - - - **226**

—— *Chandler* v. *Webster* [1904] 1 K. B. 493.
Discussed. CANTIARE SAN ROCCO, S. A. *v.* CLYDE SHIPBUILDING AND ENGINEERING CO. **H. L. (Sc.) 226**

—— *Colburn* v. *Duncombe* (1838) 9 Sim. 151.
Approved. PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - **H. L. (E.) 1**

—— *Connell* v. *Nimmo (James) & Co., Ld.* 1923 S. C. 737.
Affirmed - - - - - **595**

—— *Craddock Brothers* v. *Hunt* [1922] 2 Ch. 809; [1923] 2 Ch. 136.
Approved. UNITED STATES OF AMERICA *v.* MOTOR TRUCKS, LD. **J. C. 196**

CASES—*continued.*

—— *Cremins* v. *Guest, Keen & Nettlefolds* [1908] 1 K. B. 469.
Overruled. ST. HELENS COLLIERY CO., LD. *v.* HEWITSON **H. L. (E.) 59**

—— *Dreyfus* v. *Peruvian Guano Co.* (1889) 43 Ch. D. 316.
Opinion of the Court of Appeal in, disapproved. LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY *v.* SLACK **H. L. (E.) 851**

—— *Edell* v. *Dulieu* [1923] 2 K. B. 247.
Affirmed - - - - - **38**

—— *Elliott, In re* (1910) 102 L. T. 528.
Commented on. VERGE *v.* SOMERVILLE - - - - - **J. C. 496**

—— *Erskine, Oxenford & Co.* v. *Sachs* [1901] 2 K. B. 504.
Applied. CHRISTOFORIDES *v.* TERRY **H. L. (E.) 566**

—— *Farnell* v. *Bowman* (1887) 12 App. Cas. 643.
Referred to. WELDEN *v.* SMITH **J. C. 484**

—— *G.* v. *G.* 1923 S. C. 175.
Reversed - - - - - **349**

—— *Gane* v. *Norton Hill Colliery Co.* [1909] 2 K. B. 539, 545.
Dictum of Farwell L.J. in, considered. ST. HELENS COLLIERY CO., LD. *v.* HEWITSON - **H. L. (E.) 59**

—— *Gassiot, In re* (1901) 70 L. J. (Ch.) 242.
Commented on. VERGE *v.* SOMERVILLE - - - - - **J. C. 496**

—— *Glenie* v. *Bruce Smith* [1908] 1 K. B. 263.
Applied. MCDONALD (GERALD) & CO. *v.* NASH & CO. - **H. L. (E.) 625**

—— *Gooch, In re* [1921] 2 K. B. 593.
Applied. MCDONALD (GERALD) & CO. *v.* NASH & CO. - **H. L. (E.) 625**

—— *Goodman* v. *Mayor of Saltash* (1882) 7 App. Cas. 633.
Followed. VERGE *v.* SOMERVILLE **J. C. 496**

—— *Graham Joint Stock Shipping Co.* v. *Merchants Marine Insurance Co.* [1923] 1 K. B. 592.
Affirmed - - - - - **270**

—— *Harrison* v. *Holland* [1922] 1 K. B. 211, 213.
Dictum of Bankes L.J. in, disapproved. MAYSON *v.* CLOUET **J. C. 980**

—— *Holmes* v. *Great Northern Ry. Co.* [1909] 2 Q. B. 409.
Distinguished. ST. HELENS COLLIERY CO., LD. *v.* HEWITSON **H. L. (E.) 59**

—— *Howe* v. *Smith* (1884) 27 Ch. D. 89.
Approved. MAYSON *v.* CLOUET **J. C. 980**

CASES—*continued.*

—— *Inverclyde's (Lord) Trustees* v. *Inland Revenue* 1924 S. C. 14.
Affirmed - - - - - **580**

—— *Jee* v. *Audley* (1787) 1 Cox, 324.
Applied. WARD *v.* VAN DER LOEFF BURNYEAT *v.* VAN DER LOEFF
H. L. (E.) 653

—— *Jubilee Cotton Mills, In re* [1923] 1 Ch. 1.
Reversed - - - - **958**

—— *La Compania Martiartu* v. *Corporation of Royal Exchange Assurance* [1923] 1 K. B. 650.
Affirmed - - - - **850**

—— *Laird Line, Ld.* v. *United States Shipping Board* 1923 S. C. 316.
Reversed - - - - **286**

—— *London and India Docks Co.* v. *Borough of Woolwich* [1902] 1 K. B. 750, 759.
Dictum of Channell J. in, approved.
PORT OF LONDON AUTHORITY *v.* WOOLWICH CORPORATION
H. L. (E.) 936

—— *Lord Advocate* v. *Macalister* 1923 S. C. 495.
Affirmed - - - - **586**

—— *Macduff, In re* [1896] 2 Ch. 451, 464.
Dictum of Lindley L.J. in, approved
VERGE *v.* SOMERVILLE - **J. C. 496**

—— *McGiffin* v. *Palmer's Shipbuilding and Iron Co.* (1882) 10 Q. B. D. 5.
Considered. NIMMO (JAMES) & Co., LD. *v.* CONNELL - **H. L. (Sc.) 595**

—— *Macoun* v. *Erskine, Oxenford & Co.* [1901] 2 K. B. 493.
Applied. CHRISTOFORIDES *v.* TERRY
H. L. (E.) 566

—— *Mawman* v. *Tegg* (1826) 2 Russ. 385.
Distinguished. PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - **H. L. (E.) 1**

—— *Mighell* v. *Sultan of Johore* [1894] 1 Q. B. 149.
Applied. DUFF DEVELOPMENT CO. *v.* GOVERNMENT OF KELANTAN
H. L. (E.) 797

—— *Moore* v. *Drughorn* [1922] 2 K. B. 492.
Affirmed - - - - **53**

—— *Nevill* v. *Inland Revenue Commissioners* [1923] 2 K. B. 18.
Reversed - - - **385**

—— *Pacific Steam Navigation Co.* v. *Anglo-Newfoundland Development Co., Ld.* 1923 S. C. 526.
Affirmed - - - - **406**

—— *Performing Right Society, Ld.* v. *Edinburgh Magistrates* 1922 S. C. 165.
Approved. PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - **H. L. (E.) 1**

—— *Performing Right Society, Ld.* v. *London Theatre of Varieties, Ld.* [1922] 2 K. B. 433.
Affirmed - - - - **1**

CASES—*continued.*

—— *Port of London Authority* v. *Woolwich Corporation* [1924] 1 K. B. 30.
Affirmed - - - - **936**

—— *Russell* v. *Russell* [1924] P. 1.
Reversed - - - - **687**

—— *Samuel (P.) & Co., Ld.* v. *Dumas* [1923] 1 K. B. 592.
Affirmed - - - - **431**

—— *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Att.-Gen.* [1915] A. C. 654.
Applied. ATT.-GEN. FOR IRELAND *v.* LAGAN NAVIGATION CO.
H. L. (Ir.) 877

—— *Slack* v. *Leeds Industrial Co-operative Society* [1923] 1 Ch. 431.
Reversed - - - - **851**

—— *Small* v. *United Kingdom Mutual Marine Insurance Association* [1897] 2 Q. B. 311.
Opinion of the Court of Appeal in, overruled. SAMUEL (P.) & CO. LD. *v.* DUMAS - - **H. L. (E.) 431**

—— *Standard Oil Company of New York* v. *Clan Line Steamers, Ld.* 1923 S. C. 245.
Reversed - - - - **100**

—— *Steele* v. *M'Kinlay* (1880) 5 App. Cas. 754.
Distinguished. MCDONALD (GERALD) & Co. *v.* NASH & Co.
H. L. (E.) 625

—— *Sweet* v. *Cater* (1841) 11 Sim. 572.
Distinguished. PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - **H. L. (E.) 1**

—— *Sweet* v. *Shaw* (1839) 3 Jur. 217.
Distinguished. PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - **H. L. (E.) 1**

—— *Szymanowski* v. *Beck & Co.* [1923] 1 K. B. 457.
Affirmed - - - - **43**

—— *Tetley, In re* [1923] 1 Ch. 258.
Affirmed sub nom. ATT.-GEN. *v.* NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND - - **262**

—— *University of London Press* v. *University Tutorial Press* [1916] 2 Ch. 601.
Approved. PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - **H. L. (E.) 1**

—— *Upton* v. *Great Central Ry. Co.* [1923] 2 K. B. 789.
Reversed - - - - **302**

—— *Watson & Co.* v. *Shankland* (1871) 10 M. 142; (1873) L. R. 2 H. L. Sc. 304.
Applied. CANTIARE SAN ROCCO, S. A. *v.* CLYDE SHIPBUILDING AND ENGINEERING CO. **H. L. (Sc.) 226**

CASES—*continued.*
—— *West Surrey Water Co.* v. *Guardians of Chertsey Union* [1894] 3 Ch. 513. Dictum of North J. in, not followed. SOUTHPORT CORPORATION *v.* ATT.-GEN. - - - **H. L. (E.) 909**

—— *Willetts* v. *Watt & Co.* [1892] 2 Q. B. 92. Considered. NIMMO (JAMES) & CO. LD. *v.* CONNELL - **H. L. (Sc.) 595**

CERTIFICATE OF INCORPORATION—Company—Conclusiveness as to date - - - - - - **958**
See COMPANY (WINDING UP).

CERTIORARI—*Collection of Tax—Warrant for Distress—Judicial or Ministerial Act—Liquor Exporters Taxation Act,* 1922 (12 *Geo.* 5, *c.* 3), *s.* 6.

Judgment of the Supreme Court of Canada reversed. HETHERINGTON *v.* SECURITY EXPORT CO., LD. - - - - - **J. C. 988**

CHARITY—*Bequest for "benefit of New South Wales returned soldiers"—Commonwealth statutory Repatriation Fund.*

Judgment of the Supreme Court affirmed. VERGE *v.* SOMERVILLE - - **J. C. 496**

2. —— *"Patriotic purposes or objects"—Validity—Discretion of Trustees.*

Decision of the Court of Appeal [1923] 1 Ch. 258 affirmed. ATT.-GEN. *v.* NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND **H. L. (E.) 262**

CHARTERPARTY.
See SHIPPING.

CHILD BORN IN WEDLOCK—Legitimacy—Evidence by husband of non-access
See DIVORCE. **687**

CLYDE NAVIGATION BY-LAWS - 406
See SHIPPING.

CODICIL - - - - - - - 653
See WILL.

COLLISION - - - - 286, 406
See SHIPPING.

COLONIES.
See AUSTRALIA, BARBADOS, CANADA, GIBRALTAR, INDIA, MALTA, NEW ZEALAND, ST. LUCIA, STRAITS SETTLEMENTS.

COMMON MISTAKE—Rectification - **196**
See SPECIFIC PERFORMANCE.

COMPANY (WINDING UP) — *"Just and equitable"—Ejusdem generis Rule—Discretion of the Court—Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69, *Imp.*), *s.* 129 (*vi.*) —*Companies Act,* 1910 (*No.* 10 *of* 1910, *Barbados*), *s.* 127 (*vi.*).

Judgment of the Western Indian Court of Appeal reversed. LOCH *v.* JOHN BLACKWOOD, LD. - - - - - - - **J. C. 783**

COMPANY—*continued.*

2. —— —— *Misfeasance Summons—Promoter—Secret Profits—Shares and Debentures —Allotment before filing Statement in lieu of Prospectus—Certificate of Incorporation—Conclusiveness as to Date—Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69), *ss.* 15, 16, 17, 82, *sub-s.* 1.

Decision of the Court of Appeal [1923] 1 Ch. 1 reversed. OFFICIAL RECEIVER AND LIQUIDATOR OF JUBILEE COTTON MILLS, LD. *v.* LEWIS - - - - **H. L. (E.) 958**

CONDITION — Against over-insurance — Breach—Waiver - - - **431**
See INSURANCE (MARINE).

CONFLICT OF LAWS — *Sale of Goods—Delivery f.o.b.—Loss of Right to reject—Lex solutionis—Privy Council Practice—New Contention of Law—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 35 — *Gibraltar Ordinance No.* 20 *of* 1895, *s.* 35.

Judgment of the Court of Appeal, Malta, reversed. BENAIM & CO. *v.* DEBONO **J. C. 514**

CONSOLIDATED FUND—Unauthorized payment out - - - - **318**
See NEW ZEALAND.

CONSTITUTIONAL LAW—Payment out of Consolidated Fund - - **318**
See NEW ZEALAND.

CONTRACT—*Impossibility—Outbreak of War —Scottish Law—Contract for Sale of Machinery—Failure of Consideration—Restitution—Claim for Repayment of Sum paid on Account of Contract Price.*

Decision of the First Division of the Court of Session in Scotland 1922 S. C. 723 reversed. CANTIARE SAN ROCCO, S. A. *v.* CLYDE SHIPBUILDING AND ENGINEERING CO. **H. L. (Sc.) 226**

——Sale of goods—Conditions—Construction —Short measure - - - **43**
See SALE OF GOODS.

CONTRACT OF SALE OF LAND—Rescission —Failure to pay balance of price—Claim to recover instalments **980**
See VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE 286, 406
See SHIPPING.

COPYRIGHT — *Assignment of, in future Works—Action by Assignee for Infringement —Injunction—Right to sue without joining Assignor—Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 5, 6—*Trade Union—Society for Protection of performing Rights of Members—Restrictions on Conduct of Members' Trade or Business—Trade Union Act,* 1913 (2 *&* 3 *Geo.* 5, *c.* 30), *ss.* 1, 2.

Decision of the Court of Appeal [1922] 2 K. B. 433 affirmed. PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - - - **H. L. (E.) 1**

COTTON BROKER—Indemnity - - 566
See PRINCIPAL AND AGENT.

CRIMINAL LAW—Regulation of contracts of insurance - - - - 328
See CANADA.

CRIMINAL MATTER—Mandamus - 1011
See CANADA.

CROWN—Recovery of unauthorized payments out of Consolidated Fund 318
See NEW ZEALAND.

CUSTOMS DUTIES—Importation of liquor
See CANADA 222

DAMAGES IN LIEU OF INJUNCTION—Lord Cairns's Act - - - 851
See ANCIENT LIGHTS.

DEPENDENT RELATIVE REVOCATION
See WILL. 653

DIVORCE—*Adultery—Birth of Child—Legitimacy—Evidence by Husband of Non-access—Admissibility.*

Order of the Court of Appeal [1924] P. 1 reversed. RUSSELL *v.* RUSSELL
H. L. (E.) 687

—— Jurisdiction—British subjects of Jewish religion - - - - 1007
See EGYPT.

—— *Nullity—Impotency—Wife's Refusal of sexual Intercourse—Absence of structural Incapacity—Invincible Repugnance—Evidence—Inference of Incapacity.*

Interlocutor of the Second Division of the Court of Session in Scotland 1923 S. C. 175 reversed. G. *v.* G. - - **H. L. (Sc.) 349**

DOCKS—Partial exemption from general district rate — Continuation of exemption - - - - 936
See RATES.

DOMINION TAXATION - - - 999
See CANADA.

EGYPT—*Divorce—Jurisdiction—British Subjects of Jewish Religion—Divorce by Rabbi—Declaratory Decree by British Court—Ottoman Order in Council*, 1910, *arts.* 90, 103.

Judgment of the Supreme Court reversed. SASSON *v.* SASSON - - - **J. C. 1007**

ELECTRICITY—*Supply—Tramways worked by Electricity—Agreement between Urban District Council and Electric Supply Company—Incorporation of Urban District with Borough—Supply of Electricity by Borough Council for working Tramways in former Urban District—Electric Lighting Act*, 1909 (9 *Edw.* 7, *c.* 34), *s.* 23.

Decision of the Court of Appeal [1923] 1 Ch. 548 affirmed. SOUTHPORT CORPORATION *v.* ATT.-GEN. - - - **H. L. (E.) 909**

EMPLOYERS' LIABILITY - - - 595
See MASTER AND SERVANT.

EQUITABLE ASSIGNEE—Copyright—Infringement—Right to sue without joining assigns - - 1
See COPYRIGHT.

ESTATE DUTY - - - - - 385
See REVENUE.

EVIDENCE—Admissibility—Adultery—Birth of child—Evidence by husband of non-access - - 687
See DIVORCE.

—— Nullity—Wife's refusal of sexual intercourse—Inference of incapacity
See DIVORCE. 349

EXEMPTION FROM RATES—Docks - 936
See RATES.

EXPULSION—Of member of Medical Association - - - - - 765
See RESTRAINT OF TRADE.

FAILURE OF CONSIDERATION—Restitution—Scottish law - - 226
See CONTRACT.

FOREIGN STATE—*Sovereignty—Letter of Secretary of State as to Status—Whether Conclusive—Immunity from Legal Process—Waiver of Sovereignty—Submission to Jurisdiction—Arbitration—Enforcing Award—Arbitration Act*, 1889 (52 *&* 53 *Vict. c.* 49), *ss.* 1, 11, 12.

Decision of the Court of Appeal affirmed. DUFF DEVELOPMENT CO., LD. *v.* GOVERNMENT OF KELANTAN - - - **H. L. (E.) 797**

GAS—Accumulation in mine - - 595
See MASTER AND SERVANT.

GIBRALTAR - - - - - 514
See CONFLICT OF LAWS.

HARTER ACT - - - - - 100
See SHIPPING.

HIGHWAY—*Repair—Bridge carrying Public Road over Canal—Collapse caused by ordinary Traffic—Liability of Canal Company—Standard of Repair—Change in Character and Volume of Ordinary Traffic*—6 *&* 7 *Vict. c. civ., ss.* 62, 63, 64, 65, 66.

Decision of the Court of Appeal in Northern Ireland [1923] 1 I. R. 91 affirmed. ATT.-GEN. FOR IRELAND *v.* LAGAN NAVIGATION CO.
H. L. (Ir.) 877

IMPOSSIBILITY OF PERFORMANCE - 226
See CONTRACT.

INCAPACITY—Nullity of marriage—Inference of incapacity from refusal of sexual intercourse - - 349
See DIVORCE.

INCOME TAX - - - - - 508
See ST. LUCIA.

—— Deductions - - - - 580
See REVENUE.

—— Property tax - - - - 53
See REVENUE.

INCOMPETENCE— Of master—Omission to communicate shipbuilders' instructions as to ballasting - 100
See SHIPPING.

INDEMNITY—Broker - - - 566
See PRINCIPAL AND AGENT.

—— Emergency legislation — Voyage directed by Government - 133
See SHIPPING.

—— Liability of principal for agent's breach of duty - - - - 177
See THIRD PARTY PROCEDURE.

INDIA.
See TRADE MARK.

INFLAMMABLE GAS.
See GAS.

INFRINGEMENT — Performing right—Right to sue - - - - - 1
See COPYRIGHT.

INJURY.
See PERSONAL INJURY.

INSURANCE - - - - - 328
See CANADA.

2. —— *Burglary — "Riot" — Policy —Exceptions—Construction.*

Order of the High Court of Appeal for Ireland reversed. LONDON AND LANCASHIRE FIRE INSURANCE CO., LD. *v.* BOLANDS, LD. H. L. (Ir.) 836

INSURANCE (MARINE)—*Scuttling of Ship —Evidence.*

Decision of the Court of Appeal [1923] 1 K. B. 650 affirmed on the evidence. LA COMPAÑIA MARTIARTU *v.* CORPORATION OF ROYAL EXCHANGE ASSURANCE H. L. (E.) 850

2. —— *Scuttling of Ship by Owner— Mortgage— Action by Mortgagees on Policy— Interest of Mortgagees, whether Original or Derivative.*

Decision of the Court of Appeal [1923] 1 K. B. 592 affirmed. GRAHAM JOINT STOCK SHIPPING CO. *v.* MERCHANTS MARINE INSURANCE CO. - - - H. L. (E.) 294

3. —— *Scuttling of Ship with Connivance of Owner—Claim by innocent Mortgagee— Insurable Interest — Mortgagee's Interest, whether Original or Derivative—Perils of the Sea — Condition against over-insurance— Breach—Waiver of Breach—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 3, *sub-s.* 2; *s.* 5, *sub-s.* 2; *s.* 34, *sub-s.* 3; *s.* 50, *sub-s.* 2; *s.* 55, *sub-ss.* 1, 2; *Sch.* 1, *rr.* 7, 12.

Decision of the Court of Appeal [1923] 1 K. B. 592 affirmed. SAMUEL (P.) & CO., LD. *v.* DUMAS - - - H. L. (E.) 431

INTERFERENCE WITH BUSINESS — Emergency legislation—Indemnity
See SHIPPING. 133

JAPANESE—Employment of - - 203
See CANADA.

JUDICIAL COMMITTEE—Appeals.
See CANADA, CERTIORARI, CHARITY, COMPANY (WINDING UP), CONFLICT OF LAWS, EGYPT, NEW ZEALAND, RESTRAINT OF TRADE, ST. LUCIA, SOUTH AUSTRALIA, SPECIFIC PERFORMANCE, THIRD PARTY PROCEDURE, VENDOR AND PURCHASER.

"JUST AND EQUITABLE."
See WORDS.

LANDLORD AND TENANT - - 53
See REVENUE.

2. —— *Agricultural Holding—Lease with Option to determine—Notice to quit—Length of Notice—Agriculture Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 76), *ss.* 13, 28.

Decision of the Court of Appeal [1923] 2 K. B. 247 affirmed. EDELL *v.* DULIEU H. L. (E.) 38

LANDLORD'S PROPERTY TAX—Tenant's right of recoupment - - 53
See REVENUE.

LEASE—Option to determine—Notice to quit—Agricultural holding - 38
See LANDLORD AND TENANT.

LEGISLATIVE AUTHORITY - - 328
See CANADA.

LEGISLATIVE POWER—Dominion and provincial legislation—Conflict - 203
See CANADA.

—— Dominion taxation—Salary of minister of Provincial Government - 999
See CANADA.

LEGITIMACY—Of child born in wedlock—Adultery—Evidence by husband of non-access - - - - 687
See DIVORCE.

LIBEL—Privileged occasion - - 765
See RESTRAINT OF TRADE.

LIGHT—Obstruction - - - - 851
See ANCIENT LIGHTS.

LIMITATION OF LIABILITY — Merchant Shipping Acts - - - 100
See SHIPPING.

LORD CAIRNS'S ACT — Jurisdiction — Damages in lieu of injunction 851
See ANCIENT LIGHTS.

MALTA - - - - - - - 514
See CONFLICT OF LAWS.

MANDAMUS—Jurisdiction - - 1011
See CANADA.

MARINE INSURANCE.
See INSURANCE (MARINE).

MASTER—Incompetence — Unseaworthiness - - - - - - 100
See SHIPPING.

MASTER AND SERVANT—*Personal Injury — Negligence—Mine—Defect in Condition of Ways and Works— Accumulation of Gas owing to Failure to inspect—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1.

Decision of the First Division of the Court of Session in Scotland 1923 S. C. 737 affirmed.
NIMMO (JAMES) & CO., LD. *v.* CONNELL
H. L. (Sc.) 595

MEDICAL ASSOCIATION — Rules — Expulsion of member - - - 765
See RESTRAINT OF TRADE.

MINE—Defect in condition of ways and works - - - - - - 595
See MASTER AND SERVANT.

MISFEASANCE—Promoter - - 958
See COMPANY (WINDING UP).

MISTAKE.
See COMMON MISTAKE.

MORTGAGEE — Ship — Action on marine policy—Interest whether original or derivative - - - - - 294
See INSURANCE (MARINE).

—— Ship—Insurable interest - - 431
See INSURANCE (MARINE).

MUNICIPAL VALUATION ROLL - 185
See CANADA.

NEGLIGENCE—Personal injury - - 595
See MASTER AND SERVANT.

NEW SOUTH WALES - - 496, 765
See CHARITY, RESTRAINT OF TRADE.

NEW ZEALAND—*Constitutional Law—Payment out of Consolidated Fund — Absence of statutory Authority — Right of Crown to recover.*

Judgment of the Supreme Court affirmed.
AUCKLAND HARBOUR BOARD *v.* THE KING
J. C. 318

NON-ACCESS—Evidence by husband of—Admissibility — Adultery — Legitimacy of child born in wedlock 687
See DIVORCE.

NULLITY—Wife's refusal of sexual intercourse—Incapacity - - 349
See DIVORCE.

ONTARIO - - - - - - 196, 1011
See CANADA, SPECIFIC PERFORMANCE.

ORDERS.
See RULES AND ORDERS.

ORDINARY TRAFFIC—Change in volume and character - - - 877
See HIGHWAY.

OUTBREAK OF WAR - - - 226
See CONTRACT

OVER-INSURANCE — Condition against — Breach - - - - - - 431
See INSURANCE (MARINE).

PARLIAMENTARY ESTATE—Inalienability —Estate duty—Assessment - 385
See REVENUE.

PARTITION—Will—Construction - 166
See CANADA.

PASSING OFF - - - - - - 755
See TRADE MARK.

"PATRIOTIC PURPOSES"—Trust for 262
See CHARITY.

PERFORMING RIGHTS—Protection of 1
See COPYRIGHT.

PERILS OF THE SEA—Scuttling of ship
See INSURANCE (MARINE). 431

PERPETUITY - - - - - - 653
See WILL.

PERSONAL INJURY — Negligence — Employer's liability - - - 595
See MASTER AND SERVANT.

PRACTICE—Privy Council—Appeal—Point of law not raised in Courts below
See CONFLICT OF LAWS. 514

PRINCIPAL AND AGENT — *Indemnity—Broker employed to buy Cotton—Failure of Principal to remit Funds against Indebtedness —Closing Account—Sale by Broker and simultaneous Resale to Broker.*

Decision of the Court of Appeal affirmed.
CHRISTOFORIDES *v.* TERRY - H. L. (E.) 566

PRIVILEGE—Libel - - - - - 765
See RESTRAINT OF TRADE.

PRIVY COUNCIL—Appeals.
See JUDICIAL COMMITTEE.

PRIVY COUNCIL PRACTICE.
See PRACTICE.

PROMOTER—Secret profits - - 958
See COMPANY (WINDING UP).

PROPERTY TAX.
See LANDLORD'S PROPERTY TAX.

QUEBEC.
See CANADA.

QUIA TIMET ACTION—Damages in lieu of injunction - - - - - 851
See ANCIENT LIGHTS.

RATES — *Metropolis — Woolwich — General District Rate —Land covered with Water— Partial Exemption granted by Public Health Act*, 1875—*Continuation of Exemption— Dock coming into existence after* 1901—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 10, *sub-s.* 1; *s.* 19, *sub-s.* 1—*London (Rating) Scheme*, 1901, *clauses* 2, 6.

Decision of the Court of Appeal [1924] 1 K. B. 30 affirmed. PORT OF LONDON AUTHORITY *v.* WOOLWICH CORPORATION
H. L. (E.) 936

REMOTENESS - - - - - - **653**
See WILL.

REPAIR — Bridge cutting highway — Standard of repair - - **877**
See HIGHWAY.

REPEAL — Statute law revision — Lord Cairns's Act — Preservation of jurisdiction - - - - **851**
See ANCIENT LIGHTS.

RESCISSION—Contract of sale of land—Failure to pay balance of price—Claim to recover instalments **980**
See VENDOR AND PURCHASER.

RESTITUTION—Repayment of sum paid on account of contract price—Failure of consideration—Scottish law **226**
See CONTRACT.

RESTRAINT OF TRADE—*Medical Association—Expulsion of Member—Rule excluding expelled Member from professional Recognition—Libel—Privileged Occasion.*

Judgment of the Supreme Court of New South Wales affirmed. THOMPSON *v.* NEW SOUTH WALES BRANCH OF THE BRITISH MEDICAL ASSOCIATION - - **J. C. 765**

REVENUE — *Estate Duty — Assessment — Aggregation — Estate settled by Act of Parliament and rendered Inalienable — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 4, 5, *sub-s.* 5.

Decision of the Court of Appeal [1923] 2 K. B. 18 reversed. NEVILL *v.* INLAND REVENUE COMMISSIONERS - **H. L. (E.) 385**

2. —— *Income Tax—Deductions—Claim by Trustees to deduct Sum paid as Interest upon unpaid Estate Duty — Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case III., rr.* 1, 2.

Interlocutor of the Second Division of the Court of Session in Scotland 1924 S. C. 14 affirmed. LORD INVERCLYDE'S TRUSTEES *v.* MILLAR - - - - **H. L. (Sc.) 580**

3. —— —— *Income Tax—Landlord's Property Tax—Landlord and Tenant—Undertaking of Tenant to put Premises in Repair in Substitution for First Year's Rent—Tax paid while Premises held Rent Free—Tenant's Right of Recoupment—"Entitled to deduct in respect of the rent payable"—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. A, No. VIII., r.* 1.

Decision of the Court of Appeal [1922] 2 K. B. 492 affirmed. DRUGHORN *v.* MOORE **H. L. (E.) 53**

4. —— *Stamp Duty — "Conveyance or transfer operating as a voluntary disposition inter vivos"—Resettlement of real Estates—Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 74, *sub-ss.* 1, 5.

Decision of the Court of Appeal [1923] 1 K. B. 323 affirmed. BAKER *v.* INLAND REVENUE COMMISSIONERS - **H. L. (E.) 270**

REVENUE—*continued.*

5. —— *Succession Duty—Rate of Payment —"Succession arising" — Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 1, 2, 10, 20—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 58, *sub-ss.* 1, 4.

Decision of the First Division of the Court of Session in Scotland 1923 S. C. 495 affirmed. LORD ADVOCATE *v.* MACALISTER **H. L. (Sc.) 586**

REVOCATION—Implied—Inconsistent gifts —Failure of substituted gift—Effect on original gift - - - **653**
See WILL.

"RIOT"—Exception in policy of insurance—Construction - - - - **836**
See INSURANCE.

RIVER NAVIGATION — Clyde navigation by-laws - - - - - **406**
See SHIPPING.

RULES AND ORDERS:—
—— *Ottoman Order in Council*, 1910, *arts.* 90, 103. SASSON *v.* SASSON **J. C. 1007**

ST. LUCIA—*Income Tax—"Income arising or accruing" — Debt accruing but unpaid—Ultra vires Assessment—"Final and conclusive"—Income Tax Ordinance*, 1910 (*No.* 9 *of* 1910, *St. Lucia*), *s.* 4, *sub-s.* 1.

Judgment of the Royal Court reversed. ST. LUCIA USINES AND ESTATES CO., LD. *v.* COLONIAL TREASURER OF ST. LUCIA **J. C. 508**

SALE OF GOODS - - - - **514**
See CONFLICT OF LAWS.

2. —— *Contract—Breach—Reels of Cotton —Short Measure—Contract Note—Conditions —Construction.*

Decision of the Court of Appeal [1923] 1 K. B. 457 affirmed. BECK & CO. *v.* SZYMANOWSKI & CO. **H. L. (E.) 43**

SCOTLAND—Law of—Restitution - **226**
See CONTRACT.

SCUTTLING OF SHIP - - **294, 431, 850**
See INSURANCE (MARINE).

SECRET PROFITS—Promoter - - **958**
See COMPANY (WINDING UP).

SETTLEMENT OF REAL ESTATE—Stamp duty - - - - - - **270**
See REVENUE.

SHARES—Allotment before filing statement in lieu of prospectus - - **958**
See COMPANY (WINDING UP).

SHIPPING—*Bill of Lading—Damage to Cargo—Whether due to bad Storage or to Unseaworthiness—Construction of Conditions in Bill of Lading.*

Order of the Court of Appeal [1923] 1 K. B. 420 reversed. ELDER DEMPSTER &

SHIPPING—*continued.*
Co., Ld. *v.* Paterson, Zochonis & Co., Ld. Griffiths Lewis Steam Navigation Co., Ld. *v.* Same - - - **H. L. (E.) 522**

2. —— *Charterparty — Bill of Lading — Liability of Owners for Loss of Cargo—Unseaworthiness—Incorporation of the Harter Act — Exception of Owner's Liability for Master's Errors in Navigation—Obligation on Owner to use due Diligence to make Ship Seaworthy—Competence of Master—Turret Ship —Omission to communicate to Master Shipbuilders' Instructions as to Ballasting—Capsizing of Ship owing to Master emptying Water Ballast Tanks — Limitation of Liability —"Actual fault or privity"—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

Decision of the First Division of the Court of Session in Scotland 1923 S. C. 245 reversed. Standard Oil Co. of New York *v.* Clan Line Steamers, Ld. **H. L. (Sc.) 100**

3. —— —— — *Emergency Legislation — Voyage directed by Government — Interference with Charterers' Business—Claim for Compensation—Indemnity Act,* 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 2, *sub-ss.* 1 (*b*), 2 (*iii.*) (*b*); *Schedule, Part II.*

Decision of the Court of Appeal [1923] 1 K. B. 447 affirmed. Moss Steamship Co., Ld. *v.* Board of Trade - **H. L. (E.) 133**

4. —— *Collision—Fog—Excessive Speed—Failure to whistle—Contributory Negligence —Wrong Manœuvre immediately replaced by right Manœuvre—Imminence of Collision.*

Decision of the First Division of the Court of Session in Scotland 1923 S. C. 316 reversed and decision of the Lord Ordinary restored. United States Shipping Board *v.* Laird Line, Ld. - - - **H. L. (Sc.) 286**

5. —— —— — *Negligence — Contributory Negligence—River Navigation— Vessel being towed out of graving Dock in River — Clyde Navigation By-laws.*

Interlocutor of the Second Division of the Court of Session in Scotland 1923 S. C. 526 affirmed. Anglo-Newfoundland Development Co., Ld. *v.* Pacific Steam Navigation Co. - - - - - **H. L. (Sc.) 406**

SOUTH AUSTRALIA—*Claim against Government—Damage to Wheat delivered under Wheat Harvest Acts—Duty of Government.*

Judgment of the High Court reversed. Welden *v.* Smith - - - **J. C. 484**

SOVEREIGNTY—Letter of Secretary of State as to status—Conclusiveness
See Foreign State. **797**

SPECIFIC PERFORMANCE—*Common Mistake — Rectification — Jurisdiction to order— Rectification and Specific Performance— Statute of Frauds—Judicature Act* (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7—*Judicature Act* (*R. S. Ont.,* 1914, *c.* 56), *s.* 16 (*h*).

Judgment of the Appellate Division reversed. United States of America *v.* Motor Trucks, Ld. - - - **J. C. 196**

STAMP DUTY - - - - - - **270**
See Revenue.

STATUTE LAW REVISION REPEAL—Lord Cairns's Act - - - - - **851**
See Ancient Lights.

STATUTE OF FRAUDS.
See Specific Performance.

STATUTES:—
I. Imperial.

1843.

6 & 7 Vict. c. civ., ss. 62, 63, 64, 65, 66: Att.-Gen. for Ireland *v.* Lagan Navigation Co. - **H. L. (Ir.) 877**

1853.

16 & 17 Vict. c. 51 (Succession Duty), ss. 1, 2, 10, 20: Lord Advocate *v.* Macalister - **H. L. (Sc.) 586**

1858.

21 & 22 Vict. c. 27 (Chancery Procedure Amendment), s. 2: Leeds Industrial Co-operative Society *v.* Slack - - - **H. L. (E.) 851**

1867.

30 & 31 Vict. c. 3 (British North America), ss. 91, 92: Att.-Gen. for Ontario *v.* Reciprocal Insurers **J. C. 328**

—— —— s. 91, sub-s. 3; s. 92, sub-ss. 2, 4; Caron *v.* The King - **J. C. 999**

—— —— s. 91, heads 2, 3, s. 125, Att.-Gen. of British Columbia *v.* Att.-Gen. of Canada; Att.-Gen. for Ontario Intervener **J. C. 222**

—— —— ss. 102, 109: Rex *v.* Att.-Gen. of British Columbia - **J. C. 213**

—— —— s. 132: Att.-Gen. of British Columbia *v.* Att.-Gen. of Canada **J. C. 203**

1873.

36 & 37 Vict. c. 66 (Judicature Act), s. 16: Leeds Industrial Co-operative Society *v.* Slack - **H. L. (E.) 851**

—— —— s. 24, sub-s. 7: United States of America *v.* Motor Trucks, Ld. **J. C. 196**

1880.

43 & 44 Vict. c. 42 (Employers' Liability), s. 1, sub-s. 1; s. 2, sub-s. 1 Nimmo (James) & Co. Ld. *v.* Connell - - **H. L. (Sc.) 595**

1882.

45 & 46 Vict. c. 61 (Bills of Exchange), ss. 20, 29, 56: McDonald (Gerald) & Co. *v.* Nash & Co. **H. L. (E.) 625**

1883.

46 & 47 Vict. c. 49 (Statute Law Revision), s. 5: Leeds Industrial Co-operative Society *v.* Slack **H. L. (E.) 851**

STATUTES—*continued.*

1889.

52 & 53 Vict. c. 49 (Arbitration), ss. 1, 11, 12 : DUFF DEVELOPMENT CO. *v.* GOVERNMENT OF KELANTAN **H. L. (E.) 797**

1893.

56 & 57 Vict. c. 71 (Sale of Goods), s. 35 : BENAIM & CO. *v.* DEBONO **J. C. 514**

1894.

57 & 58 Vict. c. 30 (Finance), ss. 1, 4, 5, sub-s. 5 : NEVILL *v.* INLAND REVENUE COMMISSIONERS **H. L. (E.) 385**

57 & 58 Vict. c. 60 (Merchant Shipping Act), s. 503: STANDARD OIL CO. OF NEW YORK *v.* CLAN LINE STEAMERS, LD. - **H. L. (Sc.) 100**

1898.

61 & 62 Vict. c. 22 (Statute Law Revision), s. 1 : LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY *v.* SLACK **H. L. (E.) 851**

1899.

62 & 63 Vict. c. 14 (London Government), s. 10, sub-s. 1 ; s. 19, sub-s. 1 : PORT OF LONDON AUTHORITY *v.* WOOLWICH CORPORATION **H. L. (E.) 936**

1906.

6 Edw. 7, c. 41 (Marine Insurance), s. 3, sub-s. 2 ; s. 5, sub-s. 2 ; s. 34, sub-s. 3 ; s. 50, sub-s. 2 ; s. 55, sub-ss. 1, 2 ; Sch. I., rr. 7, 12 : SAMUEL (P.) & CO., LD. *v.* DUMAS **H. L. (E.) 431**

6 Edw. 7, c. 58 (Workmen's Compensation), s. 1, sub-s. 1 : ST. HELENS COLLIERY CO., LD. *v.* HEWITSON **H. L. (E.) 59**

—— —— s. 1, sub-s. 1 : UPTON *v.* GREAT CENTRAL RY. CO. **H. L. (E.) 302**

1908.

8 Edw. 7, c. 69 (Companies), ss. 15, 16, 17, 82, sub-s. 1 : OFFICIAL RECEIVER AND LIQUIDATOR OF JUBILEE COTTON MILLS *v.* LEWIS **H. L. (E.) 958**

—— —— s. 129 (vi.) : LOCH *v.* BLACKWOOD (JOHN), LD. - **J. C. 783**

1909.

9 Edw. 7, c. 34 (Electric Lighting), s. 23 : SOUTHPORT CORPORATION *v.* ATT.-GEN. - - - **H. L. (E.) 909**

1910.

10 Edw. 7, c. 8 (Finance (1909–10) Act), s. 58, sub-ss. 1, 4 : LORD ADVOCATE *v.* MACALISTER - **H. L. (Sc.) 586**

—— —— s. 74, sub-ss. 1, 5 : BAKER *v.* INLAND REVENUE COMMISSIONERS **H. L. (E.) 270**

STATUTES—*continued.*

1911.

1 & 2 Geo. 5, c. 49 (Copyright), ss. 5, 6 : PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - - - - **H. L. (E.) 1**

1913.

2 & 3 Geo. 5, c. 30 (Trade Union), ss. 1, 2 : PERFORMING RIGHT SOCIETY, LD. *v.* LONDON THEATRE OF VARIETIES, LD. - - - - **H. L. (E.) 1**

1918.

8 & 9 Geo. 5, c. 40 (Income Tax), Sch. A, No. VIII., r. 1 : DRUGHORN *v.* MOORE - - - **H. L. (E.) 53**

—— —— Sch. D, Case III., rr. 1, 2 ; INVERCLYDE'S (LORD) TRUSTEES *v.* MILLAR - - - **H. L. (Sc.) 580**

1920.

10 & 11 Geo. 5, c. 48 (Indemnity), s. 2, sub-ss. 1 (*b*), 2 (iii.) (*b*), Sch., Part II. : MOSS STEAMSHIP CO., LD. *v.* BOARD OF TRADE - - **H. L. (E.) 133**

10 & 11 Geo. 5, c. 76 (Agriculture), ss. 13, 18 : EDELL *v.* DULIEU **H. L. (E.) 38**

II. COLONIAL.

Barbados.

1910.

No. 10 of 1910, Barbados (Companies), s. 127 (vi.) : LOCH *v.* BLACKWOOD (JOHN), LD. - - - **J. C. 783**

Canada.

1867.

Civil Code of Quebec, art. 689 : LACOSTE *v.* DUCHESNAY - - - **J. C. 166**

Code of Civil Procedure (Quebec), art. 50 : SHANNON REALTIES, LD. *v.* VILLE DE ST. MICHEL - - **J. C. 185**

1906.

R. S. Can. 1906 (Criminal Code), s. 508c : ATT.-GEN. FOR ONTARIO *v.* RECIPROCAL INSURERS - - **J. C. 328**

—— —— ss. 827, 1025. ATT.-GEN. FOR ONTARIO *v.* DALY - **J. C. 1011**

1909.

R. S. Queb., 1909, arts. 718, 742 : MONTREAL TRAMWAYS CO. *v.* VILLE DE MONTRÉAL-NORD - - **J. C. 994**

—— arts. 5705, 5706, 5715 : SHANNON REALTIES, LD. *v.* VILLE DE ST. MICHEL - - - - **J. C. 185**

1913.

3 & 4 Geo. 5, c. 27, Dom. (Japanese Treaty) : ATT.-GEN. OF BRITISH COLUMBIA *v.* ATT.-GEN. OF CANADA **J. C. 203**

STATUTES—*continued.*

1914.

R. S. Ont., 1914, c. 56 (Judicature), s. 16 (h): UNITED STATES OF AMERICA *v.* MOTOR TRUCKS, LD. - **J. C. 196**

1917.

7 & 8 Geo. 5, c. 28, Dom., ss. 3, 4: CARON *v.* THE KING - - - **J. C. 999**

7 & 8 Geo. 5, c. 29 Dom. (Insurance), ss. 11, 12: ATT.-GEN. FOR ONTARIO *v.* RECIPROCAL INSURERS **J. C. 328**

1919.

9 & 10 Geo. 5, c. 55, Dom., s. 2, sub-s. 1: CARON *v.* THE KING - **J. C. 999**

1920.

10 Geo. 5 (Queb.), c. 21: MONTREAL TRAMWAYS CO. *v.* VILLE DE MONTRÉAL-NORD - - **J. C. 994**

1921.

11 Geo. 5, c. 49, B. C.; ATT.-GEN. OF BRITISH COLUMBIA *v.* ATT.-GEN. OF CANADA - - - **J. C. 203**

1922.

12 & 13 Geo. 5, Ont., c. 62 (Reciprocal Insurance): ATT.-GEN. FOR ONTARIO *v.* RECIPROCAL INSURERS **J. C. 328**

Gibraltar.

1895.

Gibraltar Ordinance No. 20 of 1895, s. 35: BENAIM & CO. *v.* DEBONO **J. C. 514**

St. Lucia.

1910.

No. 9 of 1910, St. Lucia (Income Tax Ordinance): ST. LUCIA USINES AND ESTATES CO., LD. *v.* COLONIAL TREASURER OF ST. LUCIA **J. C. 508**

Straits Settlements.

1907.

Code of Civil Procedure, 1907 (Straits Settlements), s. 158: EASTERN SHIPPING CO., LD. *v.* QUAH BENG KEE **J. C. 177**

STRAITS SETTLEMENTS - - - **177**
See THIRD PARTY PROCEDURE.

SUBMISSION TO JURISDICTION—Sovereign power - - - - - **797**
See FOREIGN STATE.

SUCCESSION DUTY—Rate of payment **586**
See REVENUE.

THIRD PARTY PROCEDURE—*Indemnity—Principal and Agent—Liability of Principal due to Agent's Breach of Duty—Code of Civil Procedure*, 1907 (*Straits Settlements*), *s.* 158.

Judgment of the Supreme Court reversed. EASTERN SHIPPING CO., LD. *v.* QUAH BENG KEE - - - - - - **J. C. 177**

THREATENED INJURY—Damages in lieu of injunction - - - - **851**
See ANCIENT LIGHTS.

TRADE MARK—*Passing Off—Reputation as Importer of Brand—Claim to exclusive Rights in India—Absence of Misrepresentation or Infringement.*

Judgment of the High Court (I. L. R. 50 C. 762) affirmed. IMPERIAL TOBACCO CO. OF INDIA, LD. *v.* BONNAN **J. C. 755**

TRADE UNION—Society for protection of performing rights of members — Restriction on conduct of trade or business - - - - - **1**
See COPYRIGHT.

TRAMWAYS—Supply of electricity - **909**
See ELECTRICITY.

UNCERTAINTY—Gift void for - - **262**
See CHARITY.

UNSEAWORTHINESS—Damage to cargo
See SHIPPING. **522**

—— Incompetence of master - - **100**
See SHIPPING.

VENDOR AND PURCHASER—*Purchaser failing to pay Balance of Price—Rescission by Vendor—Claim to recover Instalments of Price—Construction of Contract.*

Judgment of the Supreme Court of the Straits Settlements reversed. MAYSON *v.* CLOUET - - - - - - **J. C. 980**

WAIVER—Of breach of condition against over-insurance - - - **431**
See INSURANCE (MARINE).

WAIVER OF SOVEREIGNTY - - **797**
See FOREIGN STATE.

WHEAT — Damage to — Claim against Government - - - - **484**
See SOUTH AUSTRALIA.

WILL - - - - - - - **166, 496**
See CANADA, CHARITY.

2. —— *Codicil—Construction—Perpetuity—Revocation—Gift to Children of Brothers and Sisters—Testator's Parents living—Legal Possibility of after-born Brothers and Sisters—Inconsistent Gifts in Will and Codicil—Substituted Gift void for Remoteness—Whether Gift in Will takes Effect—Dependent relative Revocation.*

Decision of the Court of Appeal affirmed on the first point and reversed on the second [1923] 2 Ch. 52 and decision of Lawrence J. restored. WARD *v.* VAN DER LOEFF. BURNYEAT *v.* VAN DER LOEFF - **H. L. (E.) 653**

WORDS:—

—— "Arising out of" (Accidents to workmen during employment): UPTON *v.* GREAT CENTRAL RY. CO. **H. L. (E.) 302**

—— "Just and equitable" (Company—Winding up): LOCH *v.* BLACKWOOD (JOHN), LD. - - - **J. C. 783**

—— "Patriotic purposes": ATT.-GEN. *v.* NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND - **H. L. (E.) 262**

—— "Succession arising" (Succession Duty): LORD ADVOCATE *v.* MACALISTER **H. L. (Sc.) 586**

WORKMEN'S COMPENSATION—"*Arising out of and in course of employment*"—*Accident to Workman returning from Work by specially provided Train—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), s. 1, *sub-s.* 1.

Decision of the Court of Appeal reversed. ST. HELENS COLLIERY CO., LD. *v.* HEWITSON **H. L. (E.) 59**

2. —— —— *Railway Labourer returning from Work—Slip on Platform when hurrying for Train—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

Decision of the Court of Appeal [1923] 2 K. B. 879 reversed. UPTON *v.* GREAT CENTRAL RY. CO. - - **H. L. (E.) 302**

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(p. 1 to p. 226).

PART I.—FEBRUARY 6.

TABLE OF CASES.

APPEAL CASES.

		PAGE
ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* ATTORNEY-GENERAL OF CANADA	.. .. .. (P. C.)	203
ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* ATTORNEY-GENERAL OF CANADA	.. .. .. (P. C.)	222
BECK & CO. *v.* SZYMANOWSKI & CO.	H. L. (E)	43
DRUGHORN *v.* MOORE ..	H. L. (E.)	53
EASTERN SHIPPING CO. *v.* QUAH BENG KEE	.. (P. C.)	177
EDELL *v.* DULIEU ..	H. L. (E.)	38
LACOSTE *v.* DUCHESNAY	.. (P. C.)	166
MOSS STEAMSHIP CO. *v.* BOARD OF TRADE	H. L. (E.)	133
PERFORMING RIGHT SOCIETY *v.* LONDON THEATRE OF VARIETIES	H. L. (E.)	1
REX *v.* ATTORNEY-GENERAL OF BRITISH COLUMBIA	.. (P. C.)	213
ST. HELENS COLLIERY CO. *v.* HEWITSON	H. L. (E.)	59
SHANNON REALTIES *v.* VILLE DE ST. MICHAEL	.. (P. C.)	185
STANDARD OIL CO. OF NEW YORK *v.* CLAN LINE STEAMERS	H. L. (Sc.)	100
UNITED STATES *v.* MOTOR TRUCKS, LD.	(P. C.)	196

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.

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